THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

REFERENCE ONLY

346.4
Mx. North Gall.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1903_2

JUDGES

OF

THE COURT OF APPEAL.

1903.

Earl of HALSBURY, Lord Chancellor.

Lord ALVERSTONE, Lord Chief Justice of England.

Sir RICHARD HENN COLLINS, — Master of the Rolls.

Sir FRANCIS HENRY JEUNE, President of the Probate, Divorce, and Admiralty Division.

Sir ROLAND VAUGHAN WILLIAMS,
Sir ROBERT ROMER,
Sir JAMES STIRLING,
Sir JAMES CHARLES MATHEW,
Sir H. H. COZENS-HARDY,
— Lords Justices of the Court of Appeal.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1903.

The Right Hon. Lord ALVERSTONE, Lord Chief Justice of England, President.
The Hon. Sir ALFRED WILLS, Knt.
The Hon. Sir WILLIAM GRANTHAM, Knt.
The Hon. Sir JOHN COMPTON LAWRANCE, Knt.
The Hon. Sir ROBERT SAMUEL WRIGHT, Knt.
The Hon. Sir GAINSFORD BRUCE, Knt.
The Hon. Sir WILLIAM RANN KENNEDY, Knt.
The Hon. Sir EDWARD RIDLEY, Knt.
The Hon. Sir JOHN CHARLES BIGHAM, Knt.
The Hon. Sir CHARLES JOHN DARLING, Knt.
The Hon. Sir ARTHUR MOSELEY CHANNELL, Knt.
The Hon. Sir WALTER GEORGE FRANK PHILLIMORE, Bart.
The Hon. Sir THOMAS TOWNSEND BUCKNILL, Knt.
The Hon. Sir JOSEPH WALTON, Knt.
The Hon. Sir ARTHUR RICHARD JELF, Knt.

ATTORNEY-GENERAL:

Sir ROBERT B. FINLAY, Knt.

SOLICITOR-GENERAL:

Sir EDWARD H. CARSON, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
9	last line		*Asquith, K.C., J. F. W. Galbraith,* and *Bonsey,* for the respondent.
165	18		*G. S. Robertson* (*H. Sutton* with him), for the Treasury.
483	head-note, line 14	and was therefore a non-textile factory	and the engine-house was therefore a non-textile factory.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1903, will be as follows:—

In the First Series,
[1903] 1 Ch. [1903] 2 Ch.

In the Second Series,
[1903] 1 K. B. [1903] 2 K. B. [1903] P.

In the Third Series,
[1903] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Ainslie, Harman *v.*	241
Alexander *v.* Steinhardt, Walker & Co.	208
Andrews *v.* Ramsay & Co.	635
Atlantic Transport Company, Rowson *v.* (C. A.)	666
Attorney-General *v.* Murray	64
——— *v.* Northumberland (Duke of)	71
——— *v.* Regent's Canal and Dock Company	86

B.

Bagel *v.* Miller	212
Barclay, Sheffield Corporation *v.* (C. A.)	580
Baring Brothers & Co., Van Laun & Co. *v.* (C. A.)	277
Beer, Rex *v.*	693
Bell *v.* National Provincial Bank of England	249
Betty, Smith *v.* (C. A.)	317
Bingley Urban Council, Ferrand *v.*	445
Bishop, Gresham Life Assurance Society *v.* (C. A.)	171
Blakeley *v.* Muller & Co.	760, n.
Blyth Theatre Company, Sanderson *v.* (C. A.)	533
Board of Trade, Ex parte. In re Pilling (C. A.)	50
——— *v.* "Glenpark" Sailing Ship	324
———, Keslake *v.*	453
Boucas *v.* Cooke (C. A.)	227
Briggs & Son, In re (C. A.)	156
Burnand, Hambro *v.*	399
Burton and Blinkhorn, In re	300

C.

Caunt, Hampstead Corporation *v.*	1
Chorlton Union, Ormskirk Union *v.* (C. A.)	498

PAGE

City and South London Railway Company and Rector of St. Mary Woolnoth and St. Mary Woolchurch Haw, In re (C. A.) 728
Civil Service Co-operative Society *v.* General Steam Navigation Company (C. A.) 756
Coates *v.* Moore (C. A.) 140
Compañia Anonima de Seguros "Aurora," De Hart *v.* (C. A.) 503
Consett Urban Council *v.* Crawford 183
Consolidated Kent Collieries Corporation, Maynard *v.* (C. A.) 121
Cooke, Boucas *v.* (C. A.) 227
Cooper, Lockwood *v.* 428
Cornfoot *v.* Royal Exchange Assurance Corporation 363
Cornwall Justices, Rex *v.* 178
Crane & Sons *v.* Ormerod 37
Crawford, Consett Urban Council *v.* 183
Crutchley, Elliott *v.* 476
Cunard Steamship Company *v.* Marten (C. A.) 511

D.

De Hart *v.* Compañia Anonima de Seguros "Aurora" (C. A.) 503
Dixon, Robinson Brothers *v.* 701

E.

Elliott *v.* Crutchley 476
Emary *v.* Nolloth 264

F.

Faber & Co., Nelson (E.) & Co., Limited *v.* 367
Farmer *v.* Glyn-Jones 6
Ferrand *v.* Bingley Urban Council 445

G.

PAGE

G. E. B., In re (C. A.) 340
General Steam Navigation Company, Civil Service Co-operative Society *v.* (C. A.) 756
Gerson, Kaufman *v.* 114
——— *v.* Simpson (C. A.) 197
Giblan *v.* National Amalgamated Labourers' Union of Great Britain and Ireland (C. A.) 600
Glamorgan Coal Company *v.* South Wales Miners' Federation (C. A.) 545
"Glenpark" Sailing Ship, Board of Trade *v.* 324
Glyn-Jones, Farmer *v.* 6
Gordon, In re 164
Great Western Railway Company, McDowell *v.* (C. A.) 331
Greenock Steamship Company *v.* Maritime Insurance Company (C. A.) 657
Gresham Life Assurance Society *v.* Bishop (C. A.) 171

H.

Hambro *v.* Burnand 399
Hampstead Corpcration *v.* Caunt 1
Harman *v.* Ainslie 241
Harris *v.* Perry & Co. (C. A.) 219
Harse *v.* Pearl Life Assurance Company 92
Hastie and Stone, In re (C. A.) 463
Hawtrey, Molyneux *v.* (C. A.) 487
Henry, Krell *v.* (C. A.) 740
Herne Bay Steam Boat Company *v.* Hutton (C. A.) 683
Hinchcliffe, London and North Western Railway Company *v.* 32
Hoare, Mile End Guardians *v.* 483

PAGE

Hoare & Co. *v.* Morshead (C. A.) 359
Hobson *v.* Pattenden & Co. 760, n.
Holbeach Union, West Ham Union *v.* 627
Hutchings, Miles *v.* 714
Hutton, Herne Bay Steam Boat Company *v.* (C. A.) 683

I.

Islington Borough Council *v.* London School Board (C. A.) 354

J.

Jackson, McQueen *v.* 163

K.

Kaufman *v.* Gerson 114
Keslake *v.* Board of Trade 453
Krell *v.* Henry (C. A.) 740

L.

Lancashire and Yorkshire Railway Company, Pomfret *v.* (C. A.) 718

Railway Company, West Lancashire Rural Council *v.* 394
Last, Preist *v.* (C. A.) 148
Le Clair, Mourmand *v.* 216
Lockwood *v.* Cooper 428
London and North Western Railway Company *v.* Hinchcliffe 32
London City and Midland Bank, Lyon & Co. *v.* 135
London County Council, Ex parte. Rex *v.* High Bailiff of Westminster 189
London County Justices, Rex *v.* (C. A.) 19

PAGE

London School Board, Islington Borough Council *v.* (C. A.) 354
Lyon & Co. *v.* London City and Midland Bank 135

M.

McDowell *v.* Great Western Railway Company (C. A.) 331
MacIver, Sons & Co., Rathbone Brothers & Co. *v.* (C. A.) 378
McQueen *v.* Jackson 163
McQuire *v.* Western Morning News Company (C. A.) 100
Manchester Corporation *v.* Sugden (C. A.) 171
Maritime Insurance Company, Greenock Steamship Company *v.* (C. A.) 657
Marten, Cunard Steamship Company *v.* (C. A.) 511
Maynard *v.* Consolidated Kent Collieries Corporation (C. A.) 121
Midland Railway Company, Sharpe *v.* (C. A.) 26
Mile End Guardians *v.* Hoare 483
Miles *v.* Hutchings 714
Miller, Bagel *v.* 212
Molyneux *v.* Hawtrey (C. A.) 487
Moore, Ex parte. In re Slobodinsky 517
———, Coates *v.* (C. A.) 140
Moore, Nettlefold & Co. *v.* Singer Manufacturing Company 168
Morshead, Hoare & Co. *v.* (C. A.) 359
Mourmand *v.* Le Clair 216
Muller & Co., Blakeley *v.* 760, n.
Murray, Attorney-General *v.* 64

N.

Nash, Field & Co., Serjeant *v.* (C. A.) 304

PAGE

National Amalgamated Labourers' Union of Great Britain and Ireland, Giblan *v.* (C. A.) 600
National Provincial Bank of England, Bell *v.* 249
Nautilus Steam Shipping Company, Oliver *v.* (C. A.) 639
Nelson, Ogden's, Limited *v.* 287
Nelson (E.) & Co., Limited *v.* Faber & Co. 367
Nolloth, Emary *v.* 264
Northumberland (Duke of), Attorney-General *v.* 71

O.

Ogdens, Limited *v.* Nelson 287
——— *v.* Telford 287
Oliver *v.* Nautilus Steam Shipping Company (C. A.) 639
Ormerod, Crane & Sons *v.* 37
Ormskirk Union *v.* Chorlton Union (C. A.) 498

P.

Parke, Rex *v.* 432
Pattenden & Co., Hobson *v.* 760, n.
Pearl Life Assurance Company, Harse *v.* 92
Perry & Co., Harris *v.* (C. A.) 219
Pilling, In re. Ex parte Board of Trade (C. A.) 50
Pollard, In re. Ex parte Pollard (C. A.) 41
Pomfret *v.* Lancashire and Yorkshire Railway Company (C. A.) 718
Preist *v.* Last (C. A.) 148

R.

Ramsay & Co., Andrews *v.* 635
Rathbone Brothers & Co. *v.* MacIver, Sons & Co. (C. A.) 378

PAGE

Regent's Canal and Dock Company, Attorney-General *v.* 86
Rex *v.* Beer 693
——— *v.* Cornwall Justices 178
——— *v.* London County Justices (C. A.) 19
——— *v.* Parke 432
——— *v.* Westminster (High Bailiff). Ex parte London County Council 189
Robinson Brothers *v.* Dixon 701
Rowson *v.* Atlantic Transport Company (C. A.) 666
Royal Exchange Assurance Corporation, Cornfoot *v.* 363
Ruther *v.* Ruther 270

S.

St. Mary Woolnoth and St. Mary Woolchurch Haw (Rector of) and City and South London Railway Company, In re (C. A.) 728
Salmond, In re. 164
Salt *v.* Scott Hall 245
Sanderson *v.* Blyth Theatre Company (C. A.) 533
Scott Hall, Salt *v.* 245
Serjeant *v.* Nash, Field & Co. (C. A.) 304
Sharpe *v.* Midland Railway Company (C. A.) 26
Sheffield Corporation *v.* Barclay (C. A.) 580
Sibray, Hall & Co., Smith *v.* 707
Simpson, Gerson *v.* (C. A.) 197
Singer Manufacturing Company, Moore, Nettlefold & Co. *v.* 168
Slobodinsky, In re. Ex parte Moore 517
Smith *v.* Betty (C. A.) 317
——— *v.* Sibray, Hall & Co. 707
Solicitor, In re A (C. A.) 205

PAGE

South Wales Miners' Federation, Glamorgan Coal Company *v.* (C. A.) 545
Steinhardt, Walker & Co., Alexander *v.* 208
Stone and Hastie, In re (C. A.) 463
Sugden, Manchester Corporation *v.* (C. A.) 171

T.

Telford, Ogdens, Limited *v.* 287

V.

PAGE

Van Laun & Co. *v.* Baring Brothers & Co. (C. A.) 277

W.

West Ham Union *v.* Holbeach Union 627
West Lancashire Rural Council *v.* Lancashire and Yorkshire Railway Company 394
Western Morning News Company, McQuire *v.* (C. A.) 100
Westminster (High Bailiff), Rex *v.* Ex parte London County Council 189

TABLE OF CASES CITED.

A.

		PAGE
A Company, In re	[1894] 2 Ch. 349	343
Abery *v.* Williams	1 Vern. 27	532
Accomac, The	15 P. D. 208	671
Addie *v.* Western Bank of Scotland	L. R. 1 H. L. Sc., 145	422
Allen *v.* Flood	[1898] A. C. 1	558, 601
Anderson *v.* Dean	[1894] 2 Q. B. 222	143
Anglo-American Telegraph Company *v.* Spurling	5 Q. B. D. 188	598
Appleby *v.* Myers	L. R. 2 C. P. 651	478, 743, 760
Arauco Company, Re	79 L. T. 336	373
Armitage *v.* Lancashire and Yorkshire Railway Company	[1902] 2 K. B. 178	720
Arthur, In re	14 Ch. D. 603	743
Arundel *v.* Gardiner	Cro. Jac. 652	597
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	615
Ashmore *v.* Cox	[1899] 1 Q. B. 436	744
Attachment for Contempt of Court, In re	2 Times L. R. 351	432
Attorney-General *v.* Chester Corporation	14 Beav. 338.	542
——— *v.* Dobree	[1900] 1 Q. B. 442	64
——— *v.* Midland Railway Company	[1902] A. C. 171	90
——— *v.* Montagu (Lord)	[1903] 1 K. B. 483	67
——— *v.* Robinson	[1901] 2 I. R. 67	64
——— *v.* Selborne (Earl)	[1902] 1 K. B. 388	67
Austin *v.* Bunyard	6 B. & S. 687; 34 L. J. (Q.B.) 217	126
——— *v.* Great Western Railway Company	L. R. 2 Q. B. 442	226

B.

Badley *v.* Cuckfield Rural Council	59 J. P. 582	246
Bahia and San Francisco Railway Company, In re	L. R. 3 Q. B. 584	583
Bailey *v.* Barnes	[1894] 1 Ch. 25	490
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	743
Baines, Re	86 L. T. 691	50
Baldwin *v.* Dover Justices	[1892] 2 Q. B. 421	21
Balkis Consolidated Company *v.* Tomkinson	[1893] A. C. 396	583
Barber *v.* Lesiter	7 C. B. (N.S.) 175	622
Barker *v.* Hodgson	3 M. & S. 267; 15 R. R. 485	743

		PAGE
Barnes *v.* London, Edinburgh and Glasgow Assurance Company	8 Times L. R. 143; [1892] 1 Q. B. 864	94, 95
Barraclough *v.* Greenhough	L. R. 2 Q. B. 612	327
Barrow *v.* Isaacs	[1891] 1 Q. B. 417	243
Barwick *v.* English Joint Stock Bank	L. R. 2 Ex. 259	401, 600
Bayley *v.* Manchester, Sheffield and Lincolnshire Railway Company	L. R. 7 C. P. 415	615
Beckley *v.* Scott & Co.	[1902] 2 I. R. 504	643
Bedford Guardians *v.* Bedford Improvement Commissioners	21 L. J. (M.C.) 229	485
Beer *v.* Walker	46 L. J. (Q.B.) 677	152
Bellamy *v.* Saull	4 B. & S. 265; 32 L. J. (Q.B.) 366	126
Bennetts & Co. *v.* McIlwraith & Co.	[1896] 2 Q. B. 464	536
Besant *v.* Wood	12 Ch. D. 605	686
Betts *v.* Gibbins	2 A. & E. 57; 41 R. R. 381	584
Biggerstaff *v.* Rowatt's Wharf, Limited	[1896] 2 Ch. 93	373
Biggs *v.* Lawrence	3 T. R. 454; 1 R. R. 740	118
Bird *v.* Davey	[1891] 1 Q. B. 29	218
—— *v.* Holbrook	4 Bing. 628; 29 R. R. 657	332
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	583
Blackburn Corporation *v.* Sanderson	[1902] 1 K. B. 794	3
Blakeley *v.* Muller & Co.	88 L. T. 90; 67 J. P. 51; [1903] 2 K. B. 760, n.	479, 744, 760
Blenkinsopp *v.* Blenkinsopp	12 Beav. 568.	542
Bluett *v.* Osborne	1 Stark. 384; 18 R. R. 785	151
Blyth *v.* Birmingham Waterworks Company	11 Ex. 781	332
Boast *v.* Firth	L. R. 4 C. P. 1	743
Bond *v.* Evans	21 Q. B. D. 249	268
Boots *v.* Grundy	82 L. T. 769	613
Borthwick *v.* Elderslie Steamship Company	19 Times L. R. 313	382
Bosley *v.* Davies	1 Q. B. D. 84	267
Bostock *v.* Ramsey Urban Council	[1900] 2 Q. B. 616	538
Boston and Albany Railroad Company *v.* Richardson	135 Mass. 473	585
Boston Deep Sea Fishing and Ice Company *v.* Ansell	39 Ch. D. 339	636
Bowen *v.* Hall	6 Q. B. D. 333	562
Bozon *v.* Bolland	4 My. & Cr. 354; 48 R. R. 121	322
Brace *v.* Calder	[1895] 2 Q. B. 253	290
Bridge *v.* Cage	Cro. Jac. 103	597
Brighton Arcade Company *v.* Dowling	L. R. 3 C. P. 175	345
British Mutual Banking Company *v.* Charnwood Forest Railway Company	18 Q. B. D. 714	402
British Workman's and General Assurance Company *v.* Cunliffe	18 Times L. R. 425, 502	94
Brooks *v.* Mason	[1902] 2 K. B. 743	266
Brown *v.* Edgington	2 Man. & G. 279; 58 R. R. 408	151
—— *v.* Howard Fire Insurance Company	42 Maryland Rep. 384	585
—— *v.* Royal Insurance Company	1 E. & E. 853	743
—— *v.* Watkins	16 Q. B. D. 125	537
Browne, In re	L. R. 12 Eq. 137	44
Bryan *v.* Eaton	40 J. P. 213	715

		PAGE
Bryant *v.* Reading	17 Q. B. D. 128	280
Burn *v.* Carvalho	4 My. & Cr. 690; 48 R. R. 213	209
Burnby *v.* Bollett	16 M. & W. 644	152
Burton *v.* English	12 Q. B. D. 218	670
Bute (Marquis) *v.* Thompson	13 M. & W. 487	743
Butler *v.* Wearing	17 Q. B. D. 182	44

C.

Calderon *v.* Atlas Steamship Company	170 U. S. 272	670
Campbell *v.* Spottiswoode	3 B. & S. 769	103
Capital and Counties Bank *v.* Bank of England	61 L. T. 516	260
Carr *v.* Hood	1 Camp. 354; 10 R. R. 701	102
Carron Park, The	15 P. D. 203	381
Carshore *v.* North Eastern Railway Company	29 Ch. D. 344	583
Carter and Kenderdine's Contract, In re	[1897] 1 Ch. 776	528
Child *v.* Stenning	11 Ch. D. 82	535
Childers *v.* Wooler	2 E. & E. 287	583
Clark *v.* Chambers	3 Q. B. D. 327	332
Clayton's Case	1 Mer. 572; 15 R. R. 161	319
Cleland, Ex parte	L. R. 2 Ch. 808	372
Coggs *v.* Bernard	1 Sm. L. C. 11th ed. p. 173	226
Cohen *v.* Hale	3 Q. B. D. 371	478
——— *v.* Tannar	[1900] 2 Q. B. 609	308
Cohn *v.* Davidson	2 Q. B. D. 455	383
Coleman *v.* Riches	16 C. B. 104	402
Coles *v.* Hulme	8 B. & C. 568; 32 R. R. 486	217
Collen *v.* Wright	8 E. & B. 647	535, 586
Collett *v.* De Gols	Cas. t. Talb. 65	532
Collins *v.* Evans	5 Q. B. 820	582
Commissioners of Police *v.* Cartman	[1896] 1 Q. B. 655	267
Cook *v.* Cook	2 Times L. R. 10	433
Cooper and Allen to Harlech, In re	4 Ch. D. 802	71
——— *v.* Whittingham	15 Ch. D. 501	763
Copland *v.* Stein	8 T. R. 199	532
Corby *v.* Hill	4 C. B. (N.S.) 556	222
Cork and Bandon Railway Company *v.* Goode	13 C. B. 826	3
Cory *v.* Burr	8 Q. B. D. 313	514
Cory Brothers & Co. *v.* "Mecca" (Owners of)	[1897] A. C. 286	320
Cosser *v.* Collinge	3 My. & K. 283; 41 R. R. 70	489
Cottam *v.* Eastern Counties Railway Company	1 J. & H. 243	583
Cotterell *v.* Jones	11 C. B. 713	537, 614
Courage *v.* O'Shea	[1895] 1 Ch. 325	44
Covington *v.* Metropolitan District Railway Company	[1903] 1 K. B. 231	173
Croft *v.* Lumley	6 H. L. C. 672	243
Cross *v.* Barnes	48 L. J. (Q.B.) 479	138
Cumberland Union Banking Company *v.* Maryport Hæmatite Iron and Steel Company	[1892] 1 Ch. 415	138
Cundy *v.* Le Cocq	13 Q. B. D. 207	266
——— *v.* Lindsay	3 App. Cas. 459	528
Curwen *v.* Milburn	42 Ch. D. 424	322

D.

		PAGE
Dalby *v.* India and London Life Insurance Company	15 C. B. 365	67
Dalton Overseers *v.* North Eastern Railway Company	[1900] A. C. 345	447
Daniel *v.* Janes	2 C. P. D. 351	714
Daniels *v.* Potter	4 C. & P. 262; 34 R. R. 793	332
Dawson *v.* Fox	14 Q. B. D. 377	144, 279
——— *v.* Macdonald	2 M. & W. 26	132
Dean *v.* Hogg	10 Bing. 345; 38 R. R. 443	687
De Falbe, In re	[1901] 1 Ch. 523; [1902] A. C. 157	137
De Mattos *v.* Gibson	4 De G. & J. 276	692
Derry *v.* Peek	14 App. Cas. 337	586
De Silvale *v.* Kendall	4 M. & S. 37; 16 R. R. 373	480
Dixon and Cardus, In re	5 Morr. 291	55
——— *v.* Bell	5 M. & S. 198; 17 R. R. 308	332
——— *v.* Fisher	5 D. 775; 12 Cl. & F. 312	138
——— *v.* Kennaway & Co.	[1900] 1 Ch. 833	583
——— *v.* Sadler	5 M. & W. 405; 52 R. R. 774	658
Dobell & Co. *v.* Steamship Rossmore Company	[1895] 2 Q. B. 408	669
Doe *v.* Barton	11 A. & E. 307	314
—— *v.* Price	9 Bing. 356; 35 R. R. 553	372
Duckworth, In re	L. R. 2 Ch. 578	343
Dudgeon *v.* Pembroke	2 App. Cas. 284	658
Dugdale *v.* Lovering	L. R. 10 C. P. 196	583
Dyer *v.* Munday	[1895] 1 Q. B. 742	616
Dyson *v.* Greetland Local Board	13 Q. B. D. 946	448
——— *v.* Mason	22 Q. B. D. 351	430

E.

E. A. B., In re	[1902] 1 K. B. 457	50
Easton, In re	10 Mor. 111	344
Egg *v.* Blayney	21 Q. B. D. 107	4
Ellen *v.* Great Northern Railway Company	49 W. R. 395; 17 Times L. R. 453	644
Elliott *v.* Crutchley	[1903] 2 K. B. 476	688
Ellis *v.* Marshall	64 L. J. (Q.B.) 757	231
—— *v.* Ogden	11 Times L. R. 50	231
Emmens *v.* Pottle	16 Q. B. D. 354	562
Emmerton *v.* Mathews	7 H. & N. 586	152
Engelhart *v.* Farrant	[1897] 1 Q. B. 240	331
Esher Urban Council *v.* Marks	71 L. J. (K.B.) 309	447
Evans *v.* Davis	10 Ch. D. 747	243

F.

Fair *v.* M'Iver	16 East, 130; 38 R. R. 432	372
Farmer *v.* London and North Western Railway Company	20 Q. B. D. 788	355
Fenner *v.* Duplock	2 Bing. 10; 27 R. R. 537	305
Ferguson *v.* Aikin	4 Tax Cases, 36	256
Ferro, The	[1893] P. 38	671

		PAGE
Field *v.* Longden & Sons	[1902] 1 K. B. 47	643
—— *v.* Woods	7 Ad. & E. 114	132
Firbank's Executors *v.* Humphreys	18 Q. B. D. 54	585
Fisher, In re	[1894] 1 Ch. 450	536
——— *v.* Dixon	12 Cl. & F. 312	138
Foulkes *v.* Metropolitan District Railway Company	5 C. P. D. 157	226
Francis *v.* Dodsworth	4 C. B. 202	323
Francklyn *v.* Colhoun	3 Swans. 283, n.; 19 R. R. 204	45
Franklin *v.* Carter	1 C. B. 750	308
Freeman *v.* Cooke	2 Ex. 654	591
——— *v.* Read	4 B. & S. 174	449
Friend *v.* Young	[1897] 2 Ch. 421	213

G.

Gage *v.* Collins	L. R. 2 C. P. 381	180
Gallagher *v.* Humphery	10 W. R. 664	222
Gardiner *v.* Gray	4 Camp. 144; 16 R. R. 764	152
Gatty *v.* Fry	2 Ex. D. 265	125
Gautret *v.* Egerton	L. R. 2 C. P. 371	221
George *v.* Milbanke	9 Ves. 190; 7 R. R. 157	528
George Whitchurch, Limited *v.* Cavanagh	[1902] A. C. 117	402
Gibbs *v.* Guild	8 Q. B. D. 296	586
Giblan *v.* National Amalgamated Labourers' Union of Great Britain and Ireland	19 Times L. R. 708	565
Gibson *v.* Small	4 H. L. C. 353	658
Gilbert, In re	28 Ch. D. 549	544
Gilroy, Sons & Co. *v* Price & Co.	[1893] A. C. 56	382
Glamorgan Coal Company *v.* South Wales Miners' Federation	[1903] 2 K. B. 545	619
Glenochil, The	[1896] P. 10	671
Glover *v.* Booth	31 L. J. (M.C.) 270	172
Goodlet *v.* Caledonian Railway Company	4 F. 986	725
Goodlock *v.* Cousins	[1897] 1 Q. B. 348, 558	37
Gordon *v.* Jones	*Law Journal*, Jan. 4, 1896	432
Gough *v.* Wood	[1894] 1 Q. B. 713	137
Governments Stock and Other Securities Investment Company *v.* Manila Railway Company	[1897] A. C. 81	371, 528
Grainger *v.* Hill	4 Bing. N. C. 212	614
Grannell *v.* Monck	24 L. R. Ir. 241	217
Grant *v.* Norway	10 C. B. 665	402
Granville *v.* Firth	19 Times L. R. 213	766
Gray *v.* Cox	4 B. & C. 108; 28 R. R. 769	152
Grayston, Re	32 Sol. J. 680	301
Great Northern Railway Company *v.* Palmer	[1895] 1 Q. B. 862	33
Great Western Railway Company *v.* Denchworth	25 J. P. 342	449
——— *v.* Pocock	41 L. T. 415	33
——— *v.* Swindon and Cheltenham Railway Company	22 Ch. D. 677; 9 App. Cas. 787	734
Grece *v.* Hunt	2 Q. B. D. 389	3

		PAGE
Gregory *v.* Brunswick (Duke)	6 Man. & G. 205	623
Grell *v.* Levy	16 C. B. (N.S.) 73	118
Griffin, Ex parte	12 Ch. D. 480	343
Grimwood *v.* Moss	L. R. 7 C. P. 360	305
Grissell's Case	L. R. 1 Ch. 528	

H.

Hadden, Best & Co. *v.* Oppenheim	60 L. T. 962	145
Haddon *v.* Haddon	18 Q. B. D. 778	273
Haedicke and Lipski's Contract, In re	[1901] 2 Ch. 666	489
Halifax Joint Stock Bank *v.* Gledhill	[1891] 1 Ch. 31	528
Hall *v.* Launspach	[1898] 1 Q. B. 513	160
Hamlyn *v.* Wood	[1891] 2 Q. B. 488	290, 658, 744
Hammond *v.* Bussey	20 Q. B. D. 79	535
Hardwick *v.* Brown	L. R. 8 C. P. 406	695
Harnett *v.* Vyse	5 Ex. D. 307	763
Harris *v.* Dressman	23 L. J. (Ex.) 210	753
—— *v.* Scaramanga	L. R. 7 C. P. 481	503
Harrold *v.* Watney	[1898] 2 Q. B. 320	334
Hart *v.* Frontino, &c., Gold Mining Company	L. R. 5 Ex. 111	585
Hart Dyke, Ex parte	22 Ch. D. 410	308
Hastings, In re	9 Morr. 234	41
Hayward and Metropolitan Railway Company, In re	4 B. & S. 787; 33 L. J. (Q.B.) 73	192
Heap *v.* Burnley Union	12 Q. B. D. 617	247
Heath *v.* Weaverham Overseers	[1894] 2 Q. B. 108	447
Hellawell *v.* Eastwood	6 Ex. 295	138
Henwood *v.* Harrison	L. R. 7 C. P. 606	104
Hermann, Ex parte	Not reported	439
Heywood *v.* Collinge	9 Ad. & E. 268	614
Higgins *v.* Scott	2 B. & Ad. 413; 36 R. R. 607	320
Hilcoat *v.* Canterbury (Archbishop)	10 C. B. 327	734
Hill *v.* Bullock	[1897] 2 Ch. 482	138
—— *v.* Midland Railway Company	21 Ch. D. 143	734
Hills *v.* Sughrue	15 M. & W. 253	743
Hiram Maxim Light Company, In re	[1903] 1 Ch. 70	345
Hirth, In re	[1899] 1 Q. B. 612	522
Hobson *v.* Gorringe	[1897] 1 Ch. 182	137
—— *v.* Pattenden & Co.	88 L. T. 90; 19 Times L. R. 186; [1903] 2 K. B. 760, n.	687, 760
Holborn Guardians *v.* Chertsey Guardians	15 Q. B. D. 76	501
Holland *v.* Hodgson	L. R. 7 C. P. 328	138
Hollingbourn Union *v.* West Ham Union	6 Q. B. D. 580	629
Holmes *v.* North Eastern Railway Company	L. R. 4 Ex. 254; 6 Ex. 123	221
Honduras Inter-Oceanic Railway Company *v.* Tucker	2 Ex. D. 301	537
Hope *v.* Hope	8 D. M. & G. 731	118
Horner *v.* Lewis	67 L. J. (Q.B.) 524	501
Houghton *v.* Sutton Heath Collieries Company	[1901] 1 K. B. 93	29
Houldsworth *v.* City of Glasgow Bank	5 App. Cas. 317	402
Howard *v.* Refuge Friendly Society	54 L. T. 644	94
Howden *v.* Yorkshire Miners' Association	[1903] 1 K. B. 308	611

		PAGE
Howell *v.* Coupland	1 Q. B. D. 258	743, 760
Hubbard & Co., Limited, In re	68 L. J. (Ch.) 54	373
Humphrys *v.* Pratt	5 Bli. (N.S.) 154; 35 R. R. 41	588
Huntley *v.* Ward	6 C. B. (N.S.) 514	112
Huttley *v.* Simmons	[1898] 1 Q. B. 181	613
Hyde *v.* Warden	3 Ex. D. 72	489

I.

Ilott *v.* Wilkes	3 B. & Ald. 304; 22 R. R. 400	332
Inchbald *v.* Western Neilgherry Coffee Company	17 C. B. (N.S.) 733	289
Isaac, In re	2 Mor. 258	346
Ivay *v.* Hedges	9 Q. B. D. 80	221

J.

Jackson *v.* Union Marine Insurance Company	L. R. 8 C. P. 572; 10 C. P. 125; 42 L. J. (C.P.) 284	687, 752, 753
Johnston *v.* Renton	L. R. 9 Eq. 181	583
Jones *v.* Bright	5 Bing. 533; 30 R. R. 728	151
—— *v.* Carter	15 M. & W. 718	307
—— *v.* Just	L. R. 3 Q. B. 197	151
—— *v.* Lewis	1 Cox, 199	538
Jukes, In re	[1902] 2 K. B. 58	522

K.

Katy, The	[1895] P. 56	364
Kearney *v.* Lloyd	26 L. R. Ir. 268	613
Kearns *v.* Leaf	1 H. & M. 681	67
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	404
Kelly, In re	[1895] 1 Q. B. 180	300
Kennedy *v.* Panama, &c., Mail Company	L. R. 2 Q. B. 580	743
Kerrison *v.* Smith	[1897] 2 Q. B. 445	745
Kibble, Ex parte	L. R. 10 Ch. 373	344
Kidston *v.* Empire Marine Insurance Company	L. R. 1 C. P. 535	514
King *v.* England	4 B. & S. 782	168
Krell *v.* Henry	[1903] 2 K. B. 740; 18 Times L. R. 823	479, 688, 759, 761

L.

Laertes (Cargo ex)	12 P. D. 187	381
Laing *v.* Fidgeon	6 Taunt. 108; 16 R. R. 589	152
Lamb, In re	23 Q. B. D. 477	301
Lancashire and Yorkshire Railway Company *v.* Bury Corporation	14 App. Cas. 417	396
Langlois and Biden, In re	[1891] 1 Q. B. 349	157
Larard, In re	3 Mans. 317	345
Latouche *v.* Dunsany (Lord)	1 Sch. & Lef. 137	532
Lawford and Lawrence, In re	[1902] 2 K. B. 445	528

		PAGE
Lee *v.* Lancashire and Yorkshire Railway Company	L. R. 6 Ch. 527	644
Leigh *v.* Taylor	[1902] A. C. 157	137
Lennox, In re	16 Q. B. D. 315	344
Lilley, In re	[1892] 1 Q. B. 759	206
Limpus *v.* London General Omnibus Company	1 H. & C. 526	600
Linfoot *v.* Pockett	[1895] 2 Ch. 835	218
Liskeard Union *v.* Liskeard Waterworks	7 Q. B. D. 505	484
List *v.* Tharp	[1897] 1 Ch. 260	468
Little *v.* MacLellan	2 F. 387	640
Lloyd *v.* Guibert	35 L. J. (Q.B.) 74	754
London and Brighton Railway Company *v.* Watson	4 C. P. D. 118	33
London and North Western Railway Company *v.* Skerton	5 B. & S. 559	397
London Bank of Mexico and South America *v.* Apthorpe	[1891] 2 Q. B. 378	256
London Corporation *v.* St. Andrew, Holborn	L. R. 2 C. P. 574	355
London Founders' Association *v.* Clarke	20 Q. B. D. 576	744
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201	495
Lord Advocate *v.* Carse	63 J. P. 472	703
——— *v.* Stewart	63 J. P. 311	703
Low *v.* Bouverie	[1891] 3 Ch. 82	585
Lucas *v.* Nockells	4 Bing. 729; 29 R. R. 721	687
Lumley *v.* Gye	2 E. & B. 216	558
Lygo *v.* Newbold	9 Ex. 302	226
Lynch *v.* Nurdin	1 Q. B. 29; 55 R. R. 191	332
Lyon *v.* Morris	19 Q. B. D. 139	280
Lyons *v.* Martin	8 Ad. & E. 512; 47 R. R. 637	615

M.

McCheane *v.* Gyles (No. 2)	[1901] 1 Ch. 911	537
Macdonald *v.* Longbottom	1 E. & E. 977	754
McIntyre *v.* Belcher	14 C. B. (N.S.) 654	288
McIver & Co. *v.* Tate Steamers, Limited	[1902] 2 K. B. 184	172
Mackay *v.* Commercial Bank of New Brunswick	L. R. 5 P. C. 394	421
Macleod *v.* Wakley	3 C. & P. 311; 33 R. R. 668	105
McNicholas *v.* Dawson	[1899] 1 Q. B. 773	720
Manchester Overseers *v.* Ormskirk Union	24 Q. B. D. 678	627
Manchester Trust *v.* Furness	[1895] 2 Q. B. 539	495
Manders *v.* Manders	[1897] 1 Q. B. 474	270
Mann *v.* Ward	8 Times L. R. 699	333
Maori King (Owners of Cargo) *v.* Hughes	[1895] 2 Q. B. 550	380, 670
Marseilles, &c., Co., In re	L. R. 7 Ch. 161	523
Marsh *v.* Joseph	[1897] 1 Ch. 213	415
Marshall *v.* York, Newcastle and Berwick Railway Company	11 C. B. 655	226
Mary Thomas, The	[1894] P. 108	504
Massey *v.* Heynes	21 Q. B. D. 330	537
Mavro *v.* Ocean Marine Insurance Company	L. R. 10 C. P. 414	508
Melville *v.* Mirror of Life Company	[1895] 2 Ch. 531	227
Mercantile Marine Insurance Company *v.* Titherington	5 B. & S. 765; 34 L. J. (Q.B.) 11	364

		PAGE
Mercer *v.* Graves	L. R. 7 Q. B. 499	374
Merivale *v.* Carson	20 Q. B. D. 275	102
Merryweather *v.* Nixan	8 T. R. 186; 16 R. R. 810	199
Metropolitan District Railway Company *v.* Sharpe	5 App. Cas. 425	733
Mexican Prince, The	82 Fed. Rep. 484	673
Migotti *v.* Colvill	4 C. P. D. 233	364
Mills *v.* Fowkes	5 Bing. N. C. 455; 50 R. R. 750	320
Missouri Steamship Company, In re	42 Ch. D. 321	117
Mody *v.* Gregson	L. R. 4 Ex. 49	152
Moffatt *v.* Bateman	L. R. 3 P. C. 115	222
Mogul Steamship Company *v.* McGregor, Gow & Co.	23 Q. B. D. 598; [1892] A. C. 25	558, 562, 601, 621
Montaignac *v.* Shitta	15 App. Cas. 357	404
Montgomery & Co. *v.* Indemnity Mutual Marine Insurance Company	[1902] 1 K. B. 734	504, 659
Monti *v.* Barnes	[1901] 1 K. B. 205	138
Moorcock, The	14 P. D. 64	292, 742
Morewood *v.* South Yorkshire Company	3 H. & N. 798	528
Morgan *v.* North Western Railway Company	[1896] 2 Q. B. 469	734
Morris *v.* Oceanic Telegraph Company	16 Times L. R. 533	380
Mountnoy *v.* Collier	1 E. & B. 630	308
Moxham *v.* Grant	[1900] 1 Q. B. 88	199
Mulcahy *v.* Reg.	L. R. 3 H. L. 306	621
Mumford *v.* Gething	7 C. B. (N.S.) 305	753
Murphy *v.* Smith	13 R. 985	333

N.

National Exchange Company *v.* Drew	2 Macq. 103	422
Nelson *v.* Kerr	3 F. 893	30
New Brunswick Railway Company *v.* Conybeare	9 H. L. C. 711	422
Newfoundland Government *v.* Newfoundland Railway Company	13 App. Cas. 199	374
Newington *v.* Levy	L. R. 6 C. P. 180	57
Newman *v.* Jones	50 J. P. 373	179
Nickalls *v.* Merry	L. R. 7 H. L. 530	586
Nickoll *v.* Ashton	[1901] 2 K. B. 126	687, 743
Noel *v.* Redruth Foundry Company	[1896] 1 Q. B. 453	29
North River Bank *v.* Aymar	3 Hill, 262	423
Northard *v.* Pepper	10 L. T. 782	327
Northey *v.* Trevillion	7 Com. Cas. 201	291
Northey Stone Company *v.* Gidney	[1894] 1 Q. B. 99	214
Norton *v.* Dashwood	[1896] 2 Ch. 497	137
Nunes *v.* Carter	L. R. 1 P. C. 342	532

O.

Oliver *v.* Bank of England	[1902] 1 Ch. 610	585
Onslow and Whalley's Case	L. R. 9 Q. B. 219	434
Owen *v.* London and North Western Railway Company	L. R. 3 Q. B. 54	360

P.

		PAGE
Paradine *v.* Jane	Al. 26	743
Paris *v.* Levy	9 C. B. (N.S.) 342	105
Parker *v.* Cohoes (City of)	10 Hun. (N.Y.) 531; 74 N. Y. 610	332
Parkes *v.* White	11 Ves. 209	538
Parkinson *v.* Lee	2 East, 314; 6 R. R. 429	152
Parsons *v.* Brand	25 Q. B. D. 110	145, 218
Paterson *v.* Harris	1 B. & S. 336; 2 B. & S. 814	514
Perry *v.* Clements	49 W. R. 669; 17 Times L. R. 525	643
Philpott *v.* Jones	2 A. & E. 41; 41 R. R. 371	320
Pitt, Ex parte	2 Dowl. 439; 39 R. R. 734	205
Plumstead Board of Works *v.* Ingoldby	L. R. 8 Ex. 63	3
Pollard *v.* Photographic Company	40 Ch. D. 345	227
Pomphrey *v.* Southwark Press	[1901] 1 K. B. 86	29
Poole Corporation *v.* Witt	15 M. & W. 517	308
Poulton *v.* London and South Western Railway Company	L. R. 2 Q. B. 534	615
Powell *v.* Main Colliery Company	[1900] A. C. 366	642
Prescott, Dimsdale & Co. *v.* Bank of England	[1894] 1 Q. B. 351	257
Price *v.* Mouat	11 C. B. (N.S.) 508	753
Prussia, The	88 Fed. Rep. 531; 93 Fed. Rep. 837	671
Putney (Overseers of) *v.* London and South Western Railway Company	[1891] 1 Q. B. 440	355

Q.

Quarrier *v.* Colston	1 Ph. 147	117
Queensland National Bank *v.* Peninsular and Oriental Steam Navigation Company	[1898] 1 Q. B. 567	382, 672
Quinn *v.* Leathem	[1901] A. C. 495	560, 600

R.

Railway Sleepers Supply Company, In re	29 Ch. D. 204	364
Randall *v.* Newson	2 Q. B. D. 102	152
Rathbone *v.* McIver	19 Times L. R. 590	670
Read *v.* Friendly Society of Operative Stonemasons	[1902] A. C. 25	558
Redgrave *v.* Hurd	20 Ch. D. 1	584
Reeve *v.* Berridge	20 Q. B. D. 523	489
Reg. *v.* Armstrong	*The Times*, May 9, 1894	434
—— *v.* Ashton	1 E. & B. 286	429
—— *v.* Brown	L. R. 2 Q. B. 630	733
—— *v.* Browne	13 Q. B. 654	447
—— *v.* Chester Corporation	25 L. J. (Q.B.) 61	697
—— *v.* Elvet	2 E. & E. 266	627
—— *v.* Felgate	Not reported	441
—— *v.* Fordham	L. R. 8 Q. B. 501	327
—— *v.* Gray	10 Cox, 184	443
—— *v.* Heath	L. R. 1 Q. B. 218	447
—— *v.* Leeds Union	4 Q. B. D. 323	629

		PAGE
Reg. *v.* Liverpool Justices	11 Q. B. D. 638	21
—— *v.* Lord Mayor of London	L. R. 2 Q. B. 292	732
—— *v.* Market Bosworth Justices	56 L. J. (M.C.) 96	21
—— *v.* Morton	[1892] 1 Q. B. 39	695
—— *v.* Payne	[1896] 1 Q. B. 577	434
—— *v.* Rollett	L. R. 10 Q. B. 469	447
—— *v.* Smith. In re Church and London School Board	40 W. R. 333	191
—— *v.* ——. In re Westfield and Metropolitan Railway Company	12 Q. B. D. 481	191
—— *v.* Stead	11 Times L. R. 492	440
—— *v.* Welchpool Corporation	35 L. T. 594	695
—— *v.* Woodrow	15 M. & W. 404	703
Reigate Union *v.* Croydon Union	14 App. Cas. 465	629
Rendall *v.* Hill's Dry Docks and Engineering Company	[1900] 2 Q. B. 245	640
Reuter & Co. *v.* Sala	4 C. P. D. 239	214
Rex *v.* Burchett	1 Str. 567	432
—— *v.* Chitty	5 A. & E. 609	696
—— *v.* Ecclesfield	1 B. & Ald. 348; 19 R. R. 335	449
—— *v.* Fisher	2 Camp. 563; 11 R. R. 799	438
—— *v.* Fleet	1 B. & A. 379; 19 R. R. 344	443
—— *v.* Lee	5 Esp. 123	438
—— *v.* Newton	Not reported	441
—— *v.* Williams	Not reported	441
—— *v.* ——	2 L. J. (O.S.) (K.B.) 30; 26 R. R. 624	442
Reynolds *v.* Ashby	[1903] 1 K. B. 87	137
Rhodes *v.* Forwood	1 App. Cas. 256	289
Richardson *v.* Williamson	L. R. 6 Q. B. 276	585
River Lagan, The	6 Asp. M. L. C. (N.S.) 281	536
Robinson *v.* Bland	1 W. Bl. 256.	118
—— *v.* Tucker	14 Q. B. D. 371	144, 279
—— *v.* Vernon	29 L. J. (C.P.) 310	126
Robson *v.* Smith	[1895] 2 Ch. 118	373
Rodick *v.* Gandell	1 D. M. & G. 763	210
Rodney, The	[1900] P. 112	671
Roe *v.* Mutual Loan Fund	19 Q. B. D. 347	308
Roundwood Colliery Company, In re	[1897] 1 Ch. 373	373
Rousillon *v.* Rousillon	14 Ch. D. 351	118
Rowson *v.* Atlantic Telegraph Company	8 Com. Cas. 74	380
Rudow *v.* Great Britain Mutual Life Assurance Society	17 Ch. D. 600	535
Ryhope Coal Company *v.* Foyer	7 Q. B. D. 485	256

S.

St. Leonard, Shoreditch (Vestry of) *v.* London County Council	[1895] 2 Q. B. 104	355
St. Olave's Union *v.* Canterbury Union	[1897] 1 Q. B. 682	501
Salford Corporation *v.* Lever	[1891] 1 Q. B. 168	636
Salomons *v.* Pender	3 H. & C. 639	401, 636
San Paulo (Brazilian) Railway Company *v.* Carter	[1896] A. C. 31	256
Sandback Charity Trustees *v.* North Staffordshire Railway Company	3 Q. B. D. 1	360
Sanguinetti *v.* Stuckey's Banking Company	[1895] 1 Ch. 176	528

		PAGE
Sankey Brook Coal Company *v.* Marsh	L. R. 6 Ex. 185	346
Santos *v.* Illidge	6 C. B. (N.S.) 841; 8 C. B. (N.S.) 861	117
Schulte, Ex parte	L. R. 9 Q. B. 409	522
Scott *v.* Porcher	3 Mer. 652; 17 R. R. 161	210
Scottish Union and National Insurance Company *v.* Smiles	16 R. 624	172
Seed *v.* Bradley	[1894] 1 Q. B. 319	141
Shaw *v.* Smith	18 Q. B. D. 193	536
Shepherd *v.* Hills	11 Ex. 55	3
——— *v.* Pybus	3 Man. & G. 868	151
Simm *v.* Anglo-American Telegraph Company	5 Q. B. D. 188	583
Simpkin *v.* Birmingham Justices	L. R. 7 Q. B. 482	19
Simson *v.* Ingham	2 B. & C. 65; 26 R. R. 273	324
Slaughter *v.* Sunderland Corporation	55 J. P. 519	179
Smith *v.* Baker	40 L. T. 261	152
——— *v.* Cuff	6 M. & S. 160; 18 R. R. 340	93
——— *v.* Keal	9 Q. B. D. 340	583
——— *v.* Lancashire and Yorkshire Railway Company	[1899] 1 Q. B. 141	720
——— *v.* London and St. Katherine Docks	L. R. 3 C. P. 326	222
——— *v.* London and South Western Railway Company	L. R. 6 C. P. 14	333
——— *v.* Williams	9 Times L. R. 9; 56 J. P. 840	715
Solicitor, Re A	63 L. T. 350	301
Solicitor-General *v.* Law Reversionary Society	L. R. 8 Ex. 233	75
Somerset *v.* Hart	12 Q. B. D. 360	266
——— *v.* Wade	[1894] 1 Q. B. 574	267
South Hetton Coal Company *v.* North Eastern News Association	[1894] 1 Q. B. 133	108
Southcote's Case	4 Rep. 83 b	226
Stanton *v.* Richardson	L. R. 7 C. P. 421; L. R. 9 C. P. 390	380, 670
Starkey *v.* Bank of England	[1903] A. C. 114	584
State Fire Insurance Company, In re	1 D. J. & S. 634	67
Stebbing *v.* Metropolitan Board of Works	L. R. 6 Q. B. 37	733
Steel *v.* State Line Steamship Company	3 App. Cas. 72	383, 672
Steinman & Co. *v.* Angier Line	[1891] 1 Q. B. 619	670
Stirling *v.* Maitland	5 B. & S. 840	289
Stone *v.* Marine Insurance Company, Ocean, Limited, of Gothenburg	1 Ex. D. 81	364
Strang, Steel & Co. *v.* Scott & Co.	14 App. Cas. 601	504, 659
Strathdon, The	89 Fed. Rep. 374	673
Stuart *v.* Bell	[1891] 2 Q. B. 341	563
Stubbs *v.* Holywell Railway Company	L. R. 2 Ex. 311	754
Summers *v.* Solomon	7 E. & B. 879	403
Swire *v.* Francis	3 App. Cas. 106	421

T.

Tabart *v.* Tipper	1 Camp. 350; 10 R. R. 698	102
Taff Vale Railway Company *v.* Amalgamated Society of Railway Servants	[1901] A. C. 426	552, 611
Tailby *v.* Official Receiver	13 App. Cas. 523	376
Tarn, In re	[1893] 2 Ch. 280	277

		PAGE
Tattersall *v.* National Steamship Company	12 Q. B. D. 297	381
Taylor *v.* Caldwell	3 B. & S. 826; 32 L. J. (Q.B.) 164	478, 686, 740, 760
Telegraph Despatch and Intelligence Company *v.* McLean	L. R. 8 Ch. 658	289
Temperton *v.* Russell	[1893] 1 Q. B. 715	610
Thomas *v.* Kelly	13 App. Cas. 506	145, 217
——— *v.* Roberts	[1898] 1 Q. B. 657	140
Thompson & Sons *v.* North Eastern Marine Engineering Company	[1903] 1 K. B. 428	643
Thorne *v.* Heard	[1895] A. C. 495	403
Tiedemann and Ledermann Frères, In re	[1899] 2 Q. B. 66	404
Timms *v.* Baker	49 L. T. 106	243
Todd, Ex parte	3 Q. B. D. 407	21
Toleman *v.* Portbury	L. R. 6 Q. B. 245; 7 Q. B. 344	313
Tong *v.* Great Northern Railway Company	18 Times L. R. 566	643
Toplis *v.* Grane	5 Bing. (N.C.) 636; 50 R. R. 814	582
Trehearne, In re	39 W. R. 116	44
Turner *v.* Goldsmith	[1891] 1 Q. B. 544	290, 744

U.

Universal Banking Corporation, In re	L. R. 5 Ch. 492	343
Utley, In re	17 Times L. R. 349	52

V.

Vansittart, In re	[1893] 2 Q. B. 377	528
Vaughan *v.* Menlove	3 Birg. N. C. 468; 33 R. R. 711	333
Venezuela Railway Company *v.* Kisch	L. R. 2 H. L. 99	584
Vizetelly *v.* Mudie's Select Library	[1900] 2 Q. B. 170	562
Vortigern, The	[1899] P. 140	657

W.

Waikato (Owners of Cargo on) *v.* New Zealand Shipping Company	[1898] 1 Q. B. 645; [1899] 1 Q. B. 56	381
Wakelin *v.* London and South Western Railway Company	12 App. Cas. 41	718
Waller *v.* Lacy	1 Man. & G. 54; 56 R. R. 291	319
Walton *v.* Waterhouse	2 Wms. Saund. 1871 ed., p. 826	314
Ward *v.* Hobbs	2 Q. B. D. 331; 3 Q. B. D. 150; 4 App. Cas. 13	152
Ware *v.* Egmont (Lord)	4 D. M. & G. 460	490
Warren *v.* Warren	1 C. M. & R. 250; 40 R. R. 547	112
Wason *v.* Walter	L. R. 4 Q. B. 73	102
Waterhouse *v.* Gilbert	15 Q. B. D. 569	278
Watson *v.* Lothian	4 Tax Cases, 441	256
——— *v.* Mid-Wales Railway Company	L. R. 2 C. P. 593	373
Webb *v.* Shaw	16 Q. B. D. 658	279
West *v.* Dobb	L. R. 5 Q. B. 460	243

		PAGE
West Ham Union *v.* St. Matthew, Bethnal Green (Churchwardens)	[1894] A. C. 230	629
Wheatley, In re	85 L. T. 491	522
Whistler *v.* Forster	14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161	126
White and Smith's Contract, In re	[1896] 1 Ch. 637	489
Whitehouse & Co., In re	9 Ch. D. 595	345
Whiting *v.* Loomes	17 Ch. D. 10	131
Wild *v.* Southwood	[1897] 1 Q. B. 317	44
Wilkes *v.* Bodington	2 Vern. 599	532
Williams *v.* Burrell	1 C. B. 402	535
——— *v.* Jarrett	5 B. & Ad. 32	126
Wimbledon Urban Council *v.* Hastings	87 L. T. 118	184
Wolverton *v.* Attorney-General	[1898] A. C. 535; 67 L. J. (Q.B.) 829	75
Woolston *v.* Ross	[1900] 1 Ch. 788	308
Worth *v.* Brown	40 Sol. J. 515	267
Worthington *v.* Curtis	1 Ch. D. 419	64
Wortley *v.* St. Mary, Islington	51 J. P. 166	3
Wright *v.* Hall	E. B. & E. 746	743
——— *v.* John Bagnall & Sons, Limited	[1900] 2 Q. B. 240	643
——— *v.* London and North Western Railway Company	1 Q. B. D. 252	221

X.

Xenos *v.* Fox	L. R. 3 C. P. 630; 4 C. P. 665	513

Y.

Youde *v.* Manchester and District Bill Posting Company	*The Times*, June 19, 1903	565
Young *v.* Thomas	[1892] 2 Ch. 134	544

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1903.

HAMPSTEAD CORPORATION *v.* CAUNT.

1903
April 8.

Metropolis—Management Acts — New Street—Paving Expenses — Owner of House—Action to recover Apportioned Amount—Demand — Statute of Limitations (21 *Jac.* 1, *c.* 16) — *Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 77.

In 1891 a vestry paved a new street in the metropolis and apportioned the expenses; in the same year they demanded payment of an apportioned part of the expenses from the then owner of a house in the street, but he did not pay. In 1896 the defendant became owner of the house, and in 1898 the vestry demanded payment of the amount from him. In an action brought in 1903 to recover the amount:—

Held, that, under s. 105 of the Metropolis Management Act, 1855, as amended by s. 77 of the Act of 1862, an action would lie to recover the apportioned part of the expenses, and that the Statute of Limitations (21 Jac. 1, c. 16) would not begin to run in favour of the defendant, if at all, until payment was demanded from him.

ACTION tried before Wright J. without a jury.

The plaintiffs sued the defendant to recover the sum of 39*l.*, an apportioned amount of the expenses of paving a new street in the metropolis, in respect of a house of which the defendant

1903

HAMPSTEAD CORPORATION v. CAUNT.

was the owner. The work had been done and the expenses apportioned in the year 1891, and in that year a demand for payment had been made upon the then owner of the premises, but the amount had not been paid. The defendant became the owner of the premises on November 20, 1896, and a demand of payment was made upon him on December 19, 1898. The amount was claimed under s. 105 of the Metropolis Management Act, 1855 (1), as amended by s. 77 of the Metropolis Management (Amendment) Act, 1862. (2) This action was commenced on January 20, 1903.

(1) 18 & 19 Vict. c. 120, s. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

(2) 25 & 26 Vict. c. 102, s. 77: "Where any vestry or district board shall, under the powers given by the one hundred and fifth section of the firstly recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of lands in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a

1903

HAMPSTEAD CORPORATION v. CAUNT.

H. Courthope-Munroe, for the plaintiffs. The two sections, s. 105 of the Act of 1855 and s. 77 of the Act of 1862, must be read together, and the effect is that "the present or any future owner" of a house or of land in the new street is liable to pay upon demand, and an action to recover the amount after demand will lie against the owner of a house as well as against the owner of land. The matter of complaint is not complete until demand. The demand must be made upon the owner from whom the amount is sought to be recovered, and, therefore, where there has been a succession of owners, even though a demand may have previously been made upon a former owner, if it is sought to recover the money from his successor, a fresh demand must be made upon the successor. The Statute of Limitations (21 Jac. 1, c. 16), if it applies at all, does not begin to run until a demand has been made upon the owner from whom the amount is claimed: see *Grece* v. *Hunt*. (1) That statute, however, does not apply to a case like this: *Wortley* v. *St. Mary, Islington*. (2) [He also cited *Blackburn Corporation* v. *Sanderson*. (3)]

Chester Jones, for the defendant. The demand required by s. 105 is to be made only upon the first owner, and, when it has been made, the amount is recoverable from him or any succeeding owner. When a demand has been once made the amount becomes a charge upon the property: *Plumstead Board of Works* v. *Ingoldby* (4); and each successive owner becomes liable as soon as he succeeds to the ownership. The statute begins to run from the date when a person becomes owner, and this action was not commenced until more than six years after the defendant became owner. (5) An action can be brought

period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

(1) (1877) 2 Q. B. D. 389.

(2) (1886) 51 J. P. 166.

(3) [1902] 1 K. B. 794.

(4) (1872) L. R. 8 Ex. 63.

(5) *Semble*, that if any Statute of Limitations applies to this case, it is 3 & 4 Will. 4, c. 42, s. 3, and the period of limitation is not six years but twenty, as in respect of an action founded upon a specialty: see *Cork and Bandon Ry. Co.* v. *Goode*, (1853) 13 C. B. 826; *Shepherd* v. *Hills*, (1855) 11 Ex. 55.

1903

HAMPSTEAD CORPORATION v. CAUNT.

only under the provisions of s. 77, and therefore cannot be brought against the owner of a house, who is dealt with by s. 105.

Courthope-Munroe, in reply. There is no charge on the land, but only a personal liability on each successive owner: *Egg* v. *Blayney*. (1)

WRIGHT J. This is an action against the owner of a house to recover expenses of paving a new street. One question is whether an action lies at all under s. 77 of the Metropolis Management Act, 1862, against the owner of a house as distinguished from the owner of land, or whether the right of action is not confined to the persons newly made liable by that section. The other question is whether, assuming that an action would lie, it is barred in this case after the lapse of six years by the ordinary Statute of Limitations. The latter question depends apparently upon whether it was necessary to make a fresh demand upon the defendant. It seems to me to be plain that s. 105 of the Act of 1855 and s. 77 of the Act of 1862 must be read together. Sect. 105 says in effect that the owners of the houses in a street which has been paved shall on demand pay to the vestry the amount of the expenses estimated by the surveyor for the time being. It seems to me to be clear that, as regards the owners of houses who are made liable by that section, no liability exists until the demand has been made, for the simple reason that the vestry could not by merely arriving at the result in their own office make an owner liable; the result must be communicated to the owner when it is a matter to be estimated by the officer of the vestry. Where the amount has to be estimated by the officer of the vestry, it would be ridiculous to suppose that any liability could arise until that estimate had been made and communicated to the owner. Then comes s. 77 of the Act of 1862, which says that where paving is done under s. 105 of the earlier Act, not only the owners of houses, but also "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses as well as the owners of houses."

(1) (1888) 21 Q. B. D. 107.

Stopping there, it seems to me that I ought to give effect to that provision as if it were read into s. 105 of the earlier Act as an amendment, and that all the provisions of s. 105 ought, so far as they are applicable, to be applied to owners of land, and, amongst other things, that the provision requiring a demand ought to be read into s. 77. Then s. 77 proceeds: "and any such costs and expenses . . . . shall be apportioned by the vestry . . . . and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry . . . . at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments"—that seems to me to require some demand—"and any such amount shall be recoverable from the present or any future owner of the premises either by action at law" or summarily. There "such amount" seems to me to mean the amount apportioned or charged in respect of each house or premises, and that must include the amount apportioned or charged against the owner of a house under s. 105 as well as the amount apportioned or charged against the owner of land under s. 77. If so, an action can be brought in respect of either amount. I think, therefore, that an action lies, and that, as in my opinion the cause of action was not complete until there was a demand, the Statute of Limitations (21 Jac. 1, c. 16), if it runs at all, does not begin to run until the date of the demand. There must, therefore, be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *A. P. Johnson.*

Solicitors for defendant: *Shaen, Roscoe, Massey & Co.*

J. F. C.

1903

March 26; *April* 24.

FARMER *v.* GLYN-JONES.

Revenue — Stamp Duty — Medicinal Preparations — Recommendation as a Remedy by Retail Chemist—"Owner, Proprietor . . . . original or first Vendor"—Medicines Stamp Act, 1812 (52 *Geo.* 3, *c.* 150), *Schedule.*

A retail chemist who purchases a preparation of medicinal drugs from the manufacturers or from other persons, and himself attaches to the bottles in which he retails it a label recommending it as a remedy for certain specified human ailments, is not the "owner, proprietor . . . . original or first vendor thereof" within the meaning of 52 Geo. 3, c. 150, Schedule—Special Exemptions; and if the preparation at the time that he so purchased it was exempt from stamp duty, the fact of his attaching the said label will not deprive it of the exemption.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellant, an officer of inland revenue, under s. 2 of 52 Geo. 3, c. 150, against the respondent for selling a bottle containing a preparation to be used as a medicine for the prevention and cure of certain disorders, to wit, "Ammoniated Tincture of Quinine. B. P.," without a label bearing an inland revenue stamp. On the hearing of the information the following facts were proved or admitted :—

The respondent was a registered chemist and druggist carrying on business at 159, East India Dock Road, Poplar. He had served a regular apprenticeship. He held a licence for the sale of medicines liable to duty under the Medicines Stamp Duty Acts.

On April 8, 1902, the respondent, at his place of business above mentioned, sold to Mr. T. P. M. Powning, an officer of inland revenue, a bottle of ammoniated tincture of quinine, to which was affixed a label as follows :—

AMMONIATED
TINCTURE OF QUININE. B. P.

A well-known and highly recommended remedy
FOR
INFLUENZA AND COLDS.

Dose.—One teaspoonful in water every four hours until relieved.

GLYN & Co., CHEMISTS,
15A, East India Road, E.

The bottle did not bear any medicine stamp.

Ammoniated tincture of quinine is a mixture, composition, or preparation of medicinal drugs bearing different denominations and having different properties.

The ammoniated tincture of quinine sold by the respondent as aforesaid was prepared in accordance with a formula published in the British Pharmacopœia of 1898, and the letters B. P. on the label affixed to the bottle were intended to indicate that it was so prepared.

The denomination, properties, qualities, virtues, and efficacies of ammoniated tincture of quinine are known, admitted, and approved of in the prevention, cure, and relief of influenza and colds, and influenza and colds are ailments affecting the human body.

The respondent had not and did not claim to have any occult secret or art for the mixing, compounding, or preparing of ammoniated tincture of quinine, nor any exclusive right or title to the mixing, compounding, preparing, or vending of the same.

Ammoniated tincture of quinine has not been and is not prepared or sold under the authority of any Royal letters patent.

The respondent was not the originator of ammoniated tincture of quinine. It was first introduced as a medicine several years ago, and has been and is made and sold by chemists in general throughout the country. The respondent had purchased the ammoniated tincture of quinine contained in the bottle in question from wholesale chemists who compounded it, and had himself affixed the label. The wholesale chemists did not sell it under any such label or with or under any recommendation.

The owners, proprietors, makers, compounders, original or first vendors of the ammoniated tincture of quinine (unless the respondent, by reason of the said purchase from the said wholesale chemists and of the sale of the said tincture to T. P. M. Powning as aforesaid, came within any of such designations), never at any time held it out or recommended it to the public by any public notice or advertisements, or by any written or printed papers or handbills, or by any label or words written or printed and affixed to or delivered with any packet, box, bottle,

1903

FARMER v. GLYN-JONES.

phial, or other inclosure as a nostrum or proprietary medicine, or as a specific or as beneficial for the prevention, cure, or relief of any distemper, malady, ailment, or complaint incident to or in anywise affecting the human body. Neither the respondent nor such persons as aforesaid had or claimed to have any occult secret or art for the mixing, compounding, or preparing the said tincture, or any exclusive right or title to the mixing, compounding, or preparing, or to the vending of the same, and the said tincture was never prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal.

The stamp duties on medicines are granted by the Acts 42 Geo. 3, c. 56, s. 3; 44 Geo. 3, c. 98, s. 2, and Sched. B; and 52 Geo. 3, c. 150, Schedule. The bottle in question would be chargeable with duty unless it came within the exemption in the last-mentioned schedule, which exemption is as follows:—

"Special Exemptions.

"And also all mixtures, compositions, or preparations whatsoever mixed or compounded with or prepared from medicinal drugs, medicated or chemical preparations or compositions, or other ingredients bearing different denominations, or having different properties, qualities, virtues, or efficacies, which shall be uttered or vended by any such surgeon, apothecary, chemist, or druggist as aforesaid, or by any such person who hath served as a surgeon in the navy or army under any such commission or appointment as aforesaid, the different denomination properties, qualities, virtues, and efficacies of which mixtures, compositions, and preparations as aforesaid are known, admitted, and approved of in the preservation [*sic*], cure, or relief of any disorder, malady, ailment, or complaint incident to or in anywise affecting the human body, and wherein the person mixing, compounding, preparing, uttering, or vending the same hath not nor claims to have any occult secret or art for the mixing, compounding, or preparing the same, nor hath nor claims to have any exclusive right or title to the mixing, compounding, or preparing, or to the vending of the same, and which mixtures,

compositions, or preparations have not been, are not, nor shall hereafter be prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal, nor at any time heretofore have been, now are, or shall hereafter be by any public notice, advertisement, or by any written or printed papers or handbills, or by any labels or words written or printed and affixed to or delivered with any such packet, box, bottle, pot, phial, or other inclosure aforesaid held out or recommended to the public by the owners, proprietors, makers, compounders, original or first vendors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial for the prevention, cure, or relief of any such distemper, malady, ailment, or complaint as aforesaid."

The magistrate was of opinion that the respondent was not the owner, proprietor, or original or first vendor of the ammoniated tincture of quinine in question within the meaning of the special exemption contained in the schedule to 52 Geo. 3, c. 150, and that the said tincture was within the exemption. He accordingly dismissed the information subject to a case for the opinion of the Court.

Sir E. Carson, *S.-G.*, and *Rowlatt*, for the appellant. The question is as to the meaning of the word "thereof" in the exemption clause in the schedule to 52 Geo. 3, c. 150, which exempts from stamp duty mixtures sold by a chemist and which have not been recommended as remedies in the manner therein mentioned by the "owners, proprietors . . . . original or first vendors thereof." The contention for the Crown is that "thereof" refers to the last antecedent, the bottle or package in which the mixture is contained, not the mixture itself. What is intended to be taxed is not the medicine per se, but only when contained in a bottle, &c., bearing a label of recommendation. Until the label is attached it is not dutiable. And the expression "first vendors" means the first vendors of the article in a dutiable shape. By s. 2 of the taxing Act, 42 Geo. 3, c. 56, and Sched. B of 44 Geo. 3, c. 98, the duty is "for and upon every packet, box, bottle," &c.

Asquith, *K.C.*, and *Bonsey*, for the respondent. The words

1903

FARMER v. GLYN-JONES.

"first vendors thereof" refer to the medicine. It is true that by s. 2 of the Act of 42 Geo. 3 the duty is to be paid on the packet, but that duty is by s. 3 to be paid "by the owners .... and first vendors of such drugs .... before the same"—that is, the drugs—"shall be first sold." That clearly shews that the duty is to be paid, if at all, by the manufacturers or persons who first put the drug upon the market. The words in the exemption clause of the schedule to 52 Geo. 3, "owners, proprietors, makers, compounders, original or first vendors thereof," must all refer to the same subject-matter, and the word "compounders" can have no meaning as applied to a packet or bottle.

Sir E. Carson, S.-G., in reply.

Cur. adv. vult.

April 24. The judgment of the Court (Lord Alverstone C.J., Wills and Channell JJ.) was delivered by

WILLS J. The appellant is an officer of inland revenue. The respondent is a registered chemist and druggist holding a licence for the sale of medicines liable to duty under the Medicines Stamp Duty Acts.

The respondent sold, on April 8, 1902, to an officer of inland revenue a bottle with a label affixed containing the following words: "Ammoniated Tincture of Quinine. B. P., a well-known and highly recommended remedy for influenza and colds." It had, however, no stamp.

Proceedings were taken by the appellant against the respondent under 52 Geo. 3, c. 150, s. 2, for selling this bottle without a stamp. The magistrate dismissed the summons, being of opinion that no stamp was necessary.

Sect. 2 of 52 Geo. 3, c. 150, provides that, "if any person or persons, whether licensed or not, shall utter, vend, or expose to sale or offer or keep ready for sale, whether for foreign or home consumption, or buy or receive or keep for the purpose of selling by retail, either on his, her, or their own account or on the account or behalf of any other person or persons, any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, herbs, oils, waters, essences, tinctures, pills,

powders, preparations, or compositions mentioned and set forth in the schedule annexed to this Act without a paper cover, wrapper, or label provided and supplied by the Commissioners of Stamps pursuant to" 44 Geo. 3, c. 98, or to 42 Geo. 3, c. 56, "and duly stamped for denoting the duty charged on such packet, box, bottle, &c., being properly and sufficiently pasted, stuck, fastened, or affixed thereto, so and in such manner that such packet, box, &c., cannot be opened and the contents poured out or taken therefrom without tearing such stamped cover, wrapper, or label so as to prevent its being made use of again, the person or persons so offending shall" be liable to a penalty of 10*l.*

The schedule begins with a list of about 500 named powders, pills, essences, tinctures, lozenges, and preparations of every description, including "foreign medicines of all kinds, except drugs," and proceeds as follows: "And also all other pills, powders, lozenges, tinctures, &c., medicated herbs and waters, chemical and officinal preparations whatsoever to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons whatsoever, wherein" (*a*) "the person making, preparing, uttering, vending, or exposing to sale the same hath or claims to have any occult secret or art for the making or preparing the same, or hath or claims to have" (*b*) "any exclusive right or title to the making or preparing the same," or (*c*) "which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal," or (*d*) "which have at any time heretofore been, now are, or shall hereafter be by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, &c., containing the same, held out or recommended to the public by the makers, vendors, or proprietors thereof as nostrums or proprietary medicines, or as specifics or as beneficial to the prevention, cure, or relief of any distemper,

1903

FARMER v. GLYN-JONES.

Wills J.

malady, ailment, disorder, or complaint incident to or in anywise affecting the human body." The schedule continues as follows: "Special Exemptions," of which the first is, All drugs named in the book of rates referred to in the Act of Tonnage and Poundage of 12 Car. 2, c. 4, or in another book of rates referred to by the Act 11 Geo. 1, c. 7; secondly, All drugs "uttered or vended entire without any mixture or composition with any other drug or ingredient whatsoever by any surgeon, apothecary, chemist, or druggist," or other person duly qualified as therein specified; thirdly—and this is the part of the exemptions more expressly material in the present case —"All mixtures, compositions, or preparations mixed or compounded with or prepared from medicinal drugs, medicated or chemical preparations," &c., "bearing different denominations or having different properties, qualities," &c., "which shall be uttered or vended by any such surgeon, apothecary, chemist, or druggist," or other such person as aforesaid, "the different denominations, properties," &c., "of which mixtures," &c, "are known, admitted, and approved of in the preservation [*sic*], cure, or relief of any disorder, malady," &c., "affecting the human body, and wherein" (*a*) "the person mixing, compounding, preparing, uttering, or vending the same hath not nor claims to have any occult secret or art for the mixing, compounding," &c., "the same, nor" (*b*) "hath nor claims to have any exclusive right or title to the mixing, compounding," &c., "of the same, and which mixtures," &c., "have not been, are not, nor shall hereafter be prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal, nor at any time heretofore have been, now are, or shall hereafter be by any public notice, advertisement, or by any written or printed papers or handbills, or by any labels or words written or printed and affixed to or delivered with any such packet, box, bottle," &c., "held out or recommended to the public by the owners, proprietors, makers, compounders, original or first vendors thereof, as nostrums or proprietary medicines, or as specifics or as beneficial for the prevention, cure, or relief of any such distemper, malady, ailment, or complaint as aforesaid."

It is found in the case as follows: [The learned judge stated the findings as above set out.]

Unless, therefore, the respondent by affixing the label in question has brought himself within the description contained in the last portion of the "Special Exemptions" of the schedule to 52 Geo. 3, c. 150, and is "owner, proprietor, maker, compounder, original or first vendor thereof," the tincture he has sold falls in every respect within the "Special Exemptions."

The difficulty is to ascertain who are the persons meant in the "Special Exemptions" by the "owners, proprietors, makers, compounders, original or first vendors thereof," i.e., of "the mixtures, compositions, or preparations" to which the clause refers, for it is clear that such words as "makers, compounders" cannot refer to the immediate antecedent, which includes "bottle," "pot," and "phial," their application to which would be absurd.

Great light seems to be thrown upon this question by the words "at any time heretofore have been, now are, or shall hereafter be . . . . held out or recommended to the public" as beneficial for curative purposes. For it is plain that whoever the owner, proprietor, &c., may be, if he once issues an advertisement or affixes a label containing a recommendation of the preparation as of curative efficiency, the subject-matter of such advertisement or recommendation, or rather the bottle, &c., containing it, is affected with a perpetual liability to stamp duty. This consideration alone seems sufficient to shew that a retail chemist, who buys in the ordinary course of business an article which till it got into his hands was within the exemption, cannot be within the designation of the "owner, proprietor," &c., of the preparation. Indeed, the Solicitor-General was driven to the argument that "owner, proprietor," &c., referred to the last antecedent, and meant the owner, &c., of each particular bottle or phial sold. It has been already shewn that that application of the phrase would make the passage absurd. It cannot be supposed that the maker of the glass bottle can by any act of his determine its liability or non-liability to duty when containing a substance which he

1903

FARMER v. GLYN-JONES.

Wills J.

could have no object in puffing, and which the owner of the bottle and the substance could not prevent him from puffing if he were so minded.

Thus far we have dealt only with the very words of the exemption itself. It is desirable to go more deeply into the matter, and see whether the view expressed is consistent with and borne out by the rest of the legislation on the subject.

We may start with the Act of 42 Geo. 3, c. 56, because that Act recited that the earlier Act (25 Geo. 3, c. 79) had been much evaded, and repealed not only the former duties, but all powers and authorities contained in that and any subsequent Acts for levying and collecting the same. Sect. 2 of 42 Geo. 3, c. 56, granted ad valorem duties on every packet, box, bottle, &c. (using the same language in this respect as the Act of 52 Geo. 3), containing any drugs, herbs, pills, &c., or other preparations or compositions whatsoever, used or to be used externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder affecting the human body. The duties were the same in amount as those now chargeable. Sect. 3 provided that the duties should be payable by the "owners and proprietors, or makers and compounders, or original and first vendors of such drugs," &c., or other preparations or compositions as aforesaid, and should be charged upon and payable and paid in respect of every packet, box, bottle, &c., with any such contents as aforesaid before the same should be first sold or delivered out of the custody or possession of the owners, proprietors, makers, compounders or original and first vendors thereof, for sale, either wholesale or retail, either for foreign or home consumption or otherwise, and before the same should be in any way uttered or vended, or exposed to sale or offered to, or kept ready for sale and not in bulk in any shop, house, or other place by any such owner, proprietor, maker, compounder, or original and first vendor aforesaid, or any person on his behalf.

This is still the law. The 4th and 5th sections contain exemptions closely resembling, if not identical with, those now appearing as "Special Exemptions," and provide (s. 4) that nothing in the Act shall extend to charge any drug or drugs named in the two books of rates referred to in the Acts

of 12 Car. 2, c. 4, and 11 Geo. 1, c. 7, nor any medicinal drug unmixed and sold by a regular surgeon, apothecary, &c., nor (s. 5) any mixtures, compositions, &c., compounded of ingredients bearing different denominations or having different properties, qualities, &c., uttered or sold by any surgeon, apothecary, &c., as aforesaid, the different denominations, properties, &c., of which mixtures, &c., are known and approved as curative, and wherein the person mixing, compounding, &c., the same has not nor claims any occult process or exclusive right or title to mix, &c., and which have not been, are not, nor shall be prepared, uttered, &c., under letters patent under the Great Seal, nor at any time heretofore have been, now are, or shall be by public notice, &c., held out or recommended as curative "by the owners, proprietors, makers, compounders, original or first vendors thereof."

It seems impossible to doubt that the owners, proprietors, &c., here designated are the same persons as those mentioned in s. 3 as the persons who are to pay the duties before they put the wares into circulation; and it surely must be for them to say whether or not they will, by advertising it as possessing curative properties, at once obtain the advantages of such advertisement, and subject the article at once and for all time to the disadvantage of having to pay duty.

Sects. 8 and 10 of the same Act require persons making, compounding, preparing, uttering, vending, or exposing to sale or keeping ready for sale any drugs, &c., or any packets, boxes, bottles, &c., with such contents as aforesaid, which are subject to the duties, to take out licences, and to procure from the Commissioners of Stamps covers, wrappers, or labels to be affixed to the packets, boxes, &c., in which the dutiable articles are sold.

Sect. 19, in order to obviate doubts on the subject, provides that all articles enumerated in a schedule to the Act shall be dutiable, and all similar articles, and also all preparations wherein the person preparing, selling, &c., the same has or claims a secret process or exclusive right, or articles prepared, &c., under letters patent, or which heretofore have been, are now, or shall be advertised in any way as curative by "the

1903

FARMER v. GLYN-JONES.

Wills J.

makers, vendors, or proprietors thereof," and the persons uttering and selling the same, shall be charged with the duties imposed on licences.

It will be observed that this section, though giving an extensive application to substances or articles to be charged with the duty, makes no change as to the persons who are to pay the duties, and that the incidence, so far as relates to persons, is still regulated by s. 3. The importance of this remark is emphasized by the fact that the section does enlarge the class of persons required to take out licences.

Seeing that by s. 3 the duties imposed by the Act are to be paid by the "owners and proprietors, or makers and compounders, or original and first vendors" of the dutiable articles, and that if they are once so advertised by the makers, vendors, and proprietors, they become permanently affected with duty, it cannot be doubted that, notwithstanding the difference of language, the "makers, vendors, or proprietors" meant the same persons as those designated by the fuller phrase of "owners and proprietors, or makers and compounders, or original and first vendors" of the drugs or preparations.

By 43 Geo. 3, c. 73, the Act of 42 Geo. 3 was amended. By s. 1 an amended and enlarged schedule (like the former schedule only a list of specific preparations made by the Act specifically liable to duty) was substituted for the former schedule.

By s. 2 it was provided that any person who should receive from any proprietor, compounder, or original or first vendor (a phrase obviously meant to have the same scope as the longer phrase in s. 3 of the Act of 42 Geo. 3), or any agent of such person, any article subject to the duty for the purpose of selling again without the proper label affixed, and who should not within ten days either return the article to the person from whom he received it or give information to the Commissioners, should be liable to a fine, thus obviously carrying out the idea that the duties were to be paid by the person who first put the article into circulation.

The framework of these Acts was altered by the Act of 44 Geo. 3, c. 98, which repealed all the duties under the care

of the Commissioners of Stamps, but preserved the machinery for incidence and collection. It brought together all such duties in two schedules, A and B, each of which is headed "Stamp Duties." The duties now in question are in Sched. B, under the head of "Medicines," and impose upon every packet, box, bottle, &c., containing any drugs, &c., or other preparation or composition used or to be used externally or internally as medicines or medicaments, &c., uttered or vended in Great Britain, the same ad valorem duties as before, ending with a duty of 1*l.*, upon every packet, box, bottle, &c., which with its contents should exceed the value of 2*l.* 10*s.* It continues with a schedule (within the Sched. B) of some hundreds of specified articles, and collects first all the previous general descriptions of dutiable articles, and then the exceptions, under the title of "Special Exemptions." Except in a few matters of description and arrangement, of no assistance in construing the Acts, it is undistinguishable from the schedule to the Amending Act of 52 Geo. 3, c. 150, and it is only noticed as shewing how and when the legislation imposing the duties took the form of a schedule embodying both incidence and exemptions.

The duties are still payable under s. 3 of the Act of 42 Geo. 3 by the "owners and proprietors, or makers and compounders, or original or first vendors" of the preparations, the obligation of the retail dealer being that, if he receives any dutiable article without the proper label affixed, (and it will be dutiable, and dutiable for ever, if the original owner of the preparation has once advertised it as possessing remedial qualities), to return it to his vendor or to inform the Commissioners.

If, however, the article is compounded of drugs or chemicals as to which there is no secret, either of denomination, quality, efficacy, or mode of manufacture, if it is in no sense a proprietary or patent medicine, if neither the person who originally introduced it to the public, nor any person who has become the owner or proprietor—not of the bottle or box or phial in which the compound is sold, but of the right of mixing or compounding the particular preparation, so that it is not the common property of all the world—has ever advertised it as

1903

FARMER v. GLYN-JONES.

Wills J.

a specific or as possessing remedial properties, and if it is made up or sold by a duly qualified person, it is exempt from duty.

In short, the description in s. 3 of the Act of 42 Geo. 3 of the persons chargeable with the duty; that of persons recommending it by advertisement, label, or other like means, as curative, in the portion of the schedule of the Act of 52 Geo. 3 which affects it with duty; and the description of the persons by whom it must not have been so advertised if it is to escape duty contained in the "Special Exemptions"; though in somewhat different words, all mean the same thing.

The whole scheme of the Acts appears to be to strike with chargeability medicines imported from abroad and medicines which particular persons can make to the exclusion of others. The long list in the schedule consists of articles of this nature. Where a specific name affords any substantial recommendation and gives any value to the article, there is sure to be some person who can prevent other people from using the same name for his compounds. The same may be said of secret preparations. If the secret is valuable, it is pretty certain to be in the hands of some individual. So also with proprietary and patent medicines. And as the advertisement or public recommendation as a curative agent is to stamp the article with chargeability, it is reasonable to conclude that the makers, vendors, or proprietors, upon the fact of advertisement or public recommendation by whom the future as well as the present chargeability is to depend, must be persons who can exercise a choice as to whether the article shall or shall not be put upon the market with accompaniments or accessories which will make it for ever afterwards liable to duty. The fact that the persons, and the only persons, who are to pay the duties are those by whom the articles shall be first sold, and that they are to pay the duties before the articles are first sold, points strongly in the same direction.

We may add that, if we were to adopt the Solicitor-General's argument, that the respondent must be considered the "first vendor thereof," because he was the first person to sell the mixture in a shape in which it would be taxable, that is, with a label recommending it, the result would be that the exemption

never could take effect at all, for no case could come within it, except cases which the taxing enactment did not fit.

1903

FARMER v. GLYN-JONES.

Wills J.

The article sold by the respondent seems to us to have been sold by a person and under conditions which bring it within the "Special Exemptions"; and this appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Neve, Beck & Kirby.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1903

May 5.

THE KING ON THE PROSECUTION OF JAMES READ AND OTHERS *v.* THE JUSTICES FOR THE COUNTY OF LONDON.

Licensing Acts—Renewal—Alehouse—Licence for Sale of Excisable Liquors—Change of Occupancy—Expiration of Licence—Subsequent Removal—New Tenant—Application for Licence—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14.

The Alehouse Act, 1828, enacts, with regard to persons duly licensed under that Act, "If any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence," the justices may grant a licence to any new tenant or occupier of any house having so become unoccupied.

The tenant of an alehouse who was duly licensed under the Alehouse Act, 1828, applied for a renewal of his licence, which was refused. He continued in occupation of the house after his licence had expired, and then removed. A new tenant took possession of the premises, and applied for a licence under s. 14 of the Alehouse Act, 1828. The justices refused the application on the ground that, as the outgoing tenant was not licensed at the time of his removal, they had no jurisdiction to entertain the application:—

Held, affirming a judgment of the King's Bench Division, that the decision of the justices was right.

Simpkin v. *Birmingham Justices*, (1872) L. R. 7 Q. B. 482, approved.

APPEAL from a decision of the King's Bench Division upon an application for a mandamus to quarter sessions to hear and determine an appeal from justices.

C. A. 1903

REX v. LONDON COUNTY JUSTICES.

It appeared that the Manchester Arms at Walworth was licensed as a beerhouse before the year 1869, and had been continuously licensed up to January 7, 1902, when one Hacker, to whom the licence had been transferred, and who was then the tenant, was convicted of permitting drunkenness on the premises and fined 40*s*. The conviction was not indorsed on the licence. In March of the same year Hacker applied at the general annual licensing meeting for a renewal of his licence, which was refused on the ground of the conviction.

He appealed to quarter sessions against the refusal of the justices, and on April 18 the appeal was dismissed. He remained in occupation of the premises until after the hearing of the appeal, and removed from them on April 21. In the meantime the licence had expired on April 5. On April 28 the prosecutor James Read became the tenant of the premises and went into occupation. Read applied at special licensing sessions held on May 7 for a licence under the terms of s. 14 of the Alehouse Act, 1828. (1) The justices refused the application upon the ground that Hacker was not licensed at the time when he removed from the house, his licence having expired, and that consequently s. 14 did not apply, and the justices had no jurisdiction to entertain the application. An appeal to quarter sessions was dismissed, the Court holding that the justices had decided rightly, and the merits of the case were not gone into. Read and the owners of the house

(1) The Alehouse Act, 1828, s. 14: "If any person duly licensed under this Act shall (before the expiration of such licence) die . . . .; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors by retail to be drunk or consumed in such house; . . . . it shall be lawful for the justices assembled . . . . at a special session . . . . in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying . . . . or to any new tenant or occupier of any house having so become unoccupied . . . . a licence; . . . . Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing as the case may be."

thereupon applied to a Divisional Court for and obtained a rule nisi for a mandamus to the justices in quarter sessions to hear and determine the appeal. Upon argument the rule for a mandamus was discharged.

The prosecutors appealed.

Avory, K.C., and *George Elliott*, for the prosecutors, in support of the appeal. The first clause of s. 14 is governed by the words "before the expiration of such licence," but they have no application to the remainder of the section. The expression "so licensed" in the second clause should be read as referring to a person who has been duly licensed. That must be the meaning of so much of the clause as refers to the heirs, executors, administrators, or assigns of any person "so licensed," and there is no reason for giving a different meaning to the words in the two branches of the clause. The third clause, as to omission or neglect to apply for a licence, presupposes a lapse of the former licence. The power given to the justices includes the granting a licence to any new tenant or occupier of any house having so become unoccupied, and covers the case of removal as well as that of neglect to apply for a licence. The case against the application is based on *Simpkin* v. *Birmingham Justices* (1), but that decision, though not overruled in terms, has been modified by the construction put on s. 14 in *Reg.* v. *Liverpool Justices* (2), in which it was held that application under s. 14 can be made after the licence has expired. That case overruled *Ex parte Todd* (3), in which a tenant, who, as in this case, went into occupation after the expiration of the licence held by the previous tenant, was refused a licence. In *Baldwin* v. *Dover Justices* (4) it was held that justices might grant an application by a new tenant for a licence six months after the former licence had expired.

[They also referred to *Reg.* v. *Market Bosworth Justices.* (5)]

Low, K.C., and *Travers Humphreys*, for the justices. In the judgments in *Reg.* v. *Liverpool Justices* (2) it is expressly

(1) L. R. 7 Q. B. 482.
(2) (1883) 11 Q. B. D. 633.
(3) (1878) 3 Q. B. D. 407.
(4) [1892] 2 Q. B. 421.
(5) (1887) 56 L. J. (M.C.) 96.

C. A. 1903

REX v. LONDON COUNTY JUSTICES.

stated by the Master of the Rolls and Cotton L.J. that there was no intention to interfere with the decision in *Simpkin* v. *Birmingham Justices*. (1) It is submitted that the latter decision is correct, and it is directly in point in the present case. In that case as in this the tenant had applied for a licence which had been refused, and he occupied till after the expiration of the current licence, and, not being licensed at the time of his removal, it was held that the case did not come within the second clause of s. 14. The event that had happened, that is, the removal after the expiration of the licence, was not the removal of a person "so licensed," and therefore did not give jurisdiction to the justices to grant a licence under the section. In *Reg.* v. *Liverpool Justices* (2) the event that gave the justices jurisdiction, namely, the wilful omission or neglect to apply for a licence, happened while a licence was current. The question then arose, as pointed out by Cotton L.J. (3), whether, the justices having jurisdiction, there was any limit of time during which it continued. No such question arose in *Simpkin* v. *Birmingham Justices* (1), the authority of which is not affected by the later decision.

Baldwin v. *Dover Justices* (4) and *Ex parte Todd* (5) were also cases of removal during the currency of the licence. *Reg.* v. *Market Bosworth Justices* (6) did not arise under s. 14, and has no bearing on this case.

Avory, K.C., in reply.

COLLINS M.R. In this case the tenant of a licensed beer-house applied for a renewal of his licence, which was refused on the ground that he had been convicted of permitting drunkenness on the premises. He appealed to quarter sessions against the refusal, and the appeal was dismissed on April 18, 1902. He continued in occupation of the premises till April 21, but in the meanwhile the licence had run out on the 5th of that month. On April 28 James Read became tenant of the premises, and on May 7 he applied for a licence under s. 14

(1) L. R. 7 Q. B. 482.
(2) 11 Q. B. D. 638.
(3) 11 Q. B. D. 638, at p. 647.
(4) [1892] 2 Q. B. 421.
(5) 3 Q. B. D. 407.
(6) 56 L. J. (M.C.) 96.

of the Alehouse Act, 1828. The justices refused the application on the ground that he was not entitled under that section to make it. The Court of quarter sessions took the same view of the case as did the Divisional Court on an application for a mandamus, and this appeal is from the decision of that Court.

The first clause of s. 14 of the Act of 1828 relates to a time before the expiration of the licence; but it is said that this case comes within the second clause, "If any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up possession of the house specified in such licence," because in that case the justices may grant a licence to a new tenant. What is contended for is that Hacker, the man to whom a licence had been refused, had been licensed, and was within the section as a "person so licensed" who had removed from the house. The argument is that the words "any person so licensed" must embrace a person who had been, but was not at the time of the removal, in possession of a licence, and the argument was fortified by the reference in this clause of the section to "heirs, executors, administrators, or assigns of a person so licensed," on the ground that the words "person so licensed" must necessarily refer to a person who being dead was not licensed at the date of the removal, but had been licensed, and that it was reasonable to construe the first words of the clause in the same way. The argument is worthy of consideration, but the point was in terms decided by the Court of Queen's Bench in *Simpkin* v. *Birmingham Justices*. (1) That was a case in which the holder of a licence who had failed in his application for a renewal continued in occupation of the house after his licence expired. He then gave up possession to another man, who applied at special sessions for a new licence in respect of the premises under s. 14 of the Act of 1828. The application was refused by the justices, on the ground that the outgoing tenant was not licensed within the terms of the section at the time of his removal from the house, and that they had in consequence no jurisdiction. The Court of Queen's Bench held that the decision of the justices was right. That case is

(1) L. R. 7 Q. B. 482.

C. A. 1903

REX v. LONDON COUNTY JUSTICES.

Collins M.R.

directly in point, and unless it has been overruled it stands as an authority.

It is suggested that *Reg.* v. *Liverpool Justices* (1) has overruled, or at the least was decided in a manner incompatible with, the previous case. At first sight, and until the remainder of s. 14 is considered, this would appear to be so. The third clause of the section is: "If the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell excisable liquors." The case was one in which the licence-holder, being about to leave the house owing to illness in her family, wilfully omitted or neglected to apply for a renewal, and application for a licence was made by a person who succeeded her in the occupation of the house. The case was decided under the clause that I have just read as coming within its express words. The omission or neglect to apply for a renewal was proved, and there was nothing to disentitle the new tenant from asking for a licence. In the case before us the licensed person had not neglected to apply—on the contrary, he had applied and failed; and the case clearly does not fall within that part of the section under which *Reg.* v. *Liverpool Justices* (1) was decided. The Court in that case had before them the distinction between the two cases, and Lord Esher, at p. 647 of the report, said: "We do not in the least interfere with *Simpkin* v. *Birmingham Justices* (2), for the decision there was not that there was any limitation of time, but that the circumstances were not such as to bring the case within the section at all"; and Cotton L.J. expressed his agreement, adding with regard to that case: "All it decided was that where the tenant who had the licence did not remove until after his licence had expired, he was not a person 'so licensed' removing, for that, on the construction of that part of the section, the person removing must be a person licensed at the time that he removed." In the argument the case of *Simpkin* v. *Birmingham Justices* (2) was treated as having been rightly decided. We have thus a decision in the year 1872 on

(1) 11 Q. B. D. 638. (2) L. R. 7 Q. B. 482.

the point raised in the present case. We have that decision treated as correct in the argument and judgments in a case in the year 1883, and in the year 1903 we are asked to overrule it. In my opinion this Court would not be justified in going de novo into the merits of the decision in *Simpkin* v. *Birmingham Justices* (1) or in overruling it; and this appeal must therefore be dismissed.

STIRLING L.J. I entirely agree. We cannot allow this appeal without overruling the decision in *Simpkin* v. *Birmingham Justices* (1), decided thirty-one years ago, which, far from being (as suggested) overruled, or at least made of less authority, by the decision of the Court of Appeal in *Reg.* v. *Liverpool Justices* (2), appears to be supported by the judgments of two members of the Court which decided that case.

MATHEW L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *H. A. Graham & Wigley.*
Solicitors for justices: *Laytons.*

(1) L. R. 7 Q. B. 482. (2) 11 Q. B. D. 638.

A. M.

C. A.
1903
May 4

[IN THE COURT OF APPEAL.]

SHARPE *v.* THE MIDLAND RAILWAY COMPANY.

Employer and Workman — Compensation — Earnings — Railway Guard — Lodging Allowance — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule*, (1), (*a*), (*i.*).

A railway guard, in the course of his duty, had frequently to lodge away from home, and on these occasions he was entitled to be paid, in addition to his ordinary wages, certain fixed sums, under the name of lodging allowances. The object of the allowances was to cover out of pocket expenses, to which he was put by having to sleep away from home, and the amount of the allowances was about equal to the cost of board and lodging for the time covered by the allowances. No inquiry was made by the railway company as to the actual expense incurred by the guard, and there was no evidence as to profit being actually made by him out of the allowances. On an appeal against an award of compensation under the Workmen's Compensation Act:—

Held, that, in estimating the earnings of the guard, the amount of the lodging allowances was properly taken into account, without regard to the question whether any profit was made out of them.

Appeal from an award of the judge of the Derby County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a man named Sharpe, who was employed as a goods guard by the respondents, the Midland Railway Company.

The facts of the case were set out in the written judgment of the county court judge, from which the following statement is taken.

It was admitted that Sharpe met with an accident, which caused his death, under such circumstances that the company were liable to pay compensation under the Act. There was no dispute as to the wages that he had earned in the three years preceding his injury; but the question was whether, in computing the amount of compensation to be paid, certain sums received by him for "lodging allowances" should be taken into account as a part of his earnings.

The terms of employment of a goods guard in the service of the Midland Railway are, so far as is material to the present case, as follows: The regular day's work is ten hours and the week's work sixty hours, for which a fixed wage is paid. If the week's work exceeds sixty hours, the guard is entitled to extra pay. After being on duty for ten hours he is entitled to nine hours' rest, and that is the regular rest time between long outward and return journeys. He has frequently to lodge away from home, and on these occasions is entitled to a lodging allowance. If the lodgings are provided by the company, the allowance is—country 1*s.* and London 1*s.* 6*d.* If he finds his own lodgings, the allowance is—country 2*s.* and London 3*s.* The minimum time for which a lodging allowance may be drawn is nine hours. If a guard has to remain away longer than nine hours, further allowances are made. For the purpose of ascertaining the time during which a guard is on duty with his train and off duty, and entitled to a lodging allowance, he "signs on" when he takes his train from the home station. When he arrives at a station where he is to wait nine hours or more, he "signs off"; when he rejoins his train for the return journey, he "signs on" again, and "signs off" on his arrival at the home station. At the end of his journey he makes a return of the hours during which he has been "signed on," that is, at work, and his wages are regulated accordingly. He also separately makes a claim for lodging allowance in respect of the hours during which he has been "signed off." The object of the lodging allowance was stated by an official of the company to be to cover out of pocket expenses to which a guard is put through having to sleep away from home. It was found as a fact by the county court judge that the amount of the allowance was about equal to the reasonable cost of board and lodging, or of board only if the company's lodgings are used, for the time covered by the allowance. It was proved that no inquiry is made as to the expenses incurred by a guard for board and lodging, and it was admitted that if a guard boarded and lodged with a friend, and at the friend's expense, or if he took his own food with him, he would nevertheless be entitled to his lodging allowance. The county

C. A. 1903

SHARPE v. MIDLAND RAILWAY.

court judge was of opinion that a guard might make a profit out of his allowance, but he had no evidence before him that the deceased or any other guard ever did in fact make any profit, and the guards who gave evidence stated that at times the cost of their board and lodging exceeded the allowance. The deceased always found his own lodgings, and during the three years previous to his injury had lodged out on 214 occasions, and drew in all 23*l.* 2*s.* for lodging allowance.

The county court judge was of opinion that the sum in question formed part of the deceased's earnings within the meaning of the Act. He was of opinion that the absences from home were incidents of the service, and that the allowance could not be regarded as a mere repayment of out of pocket expenses, being in fact a fixed payment, independent of what the guard actually expended in board and lodging; and, further, that as the guard must sleep and eat, whether at home or away from home, the fact that he has a special allowance for lodging and food when away from home was of some pecuniary benefit to him. The judge pointed out that a guard was as much entitled to the allowance, when the occasion arose, as to his regular wages, and that the allowance made an addition to the regular wages. An award was therefore made on the footing of including the amount received for lodging allowance in the earnings of the deceased.

The respondent company appealed.

April 23. *Hugo Young, K.C.*, and *J. D. Crawford*, for the company. The lodging allowances formed no part of the earnings of the deceased. They were paid, not for the time that he was at work, but for periods when he was off duty. They were paid to recoup him for expenses incurred in the interest of his employers. The case is the same as if the company had contracted with some one to provide board and lodging, and had paid the amounts direct to the person with whom they contracted. In such a case it would be impossible to treat them as earnings. The payments were to cover the expenses of the deceased incurred by reason of his duties preventing his returning home, and it is found as a fact that

the allowance is about equal to the cost. The term earnings is not applicable to money which the workman receives with one hand and pays away with the other. A sum, for instance, allowed to a commercial traveller for his railway fares could not properly be treated as part of his income. The most that could under any circumstances be taken into account as earnings would be the profit made by the deceased. As to the proportion of the payment which could be treated as profit there was no evidence, and to arrive at the amount it would have been necessary to determine how much of the allowance was in excess of the expenditure the guard would have incurred at home. Lastly, the earnings must be of such a nature that the deceased's dependants were dependent on them, which was not the case, since these moneys represented sums actually spent by the deceased when away from his family.

S. T. Evans, K.C., and *Clement Edwards*, for the applicant. In an inquiry as to "earnings," the test is not the loss to the widow. The compensation is based on the earnings during the three preceding years. When those have been ascertained, the scale is applied subject to a maximum amount. In estimating the earnings it is clear that something beyond mere wages, ordinarily so called, should be taken into account: *Noel* v. *Redruth Foundry Co.* (1); *Pomphrey* v. *Southwark Press* (2); *Houghton* v. *Sutton Heath Collieries Co.* (3) The wages were computed with regard to certain specified hours of work, there was a payment for overtime at a fixed rate, and allowances for board and lodging, also at a fixed rate, during the time the guard was away from home. It can make no difference that the amount actually paid in respect of this last item was dependent on the movements of the guard. If it had been a fixed estimated sum it would certainly be included in earnings. His absence from home was in the discharge of his duty to his employers, and he was as much entitled to be paid in respect of that as he was to be paid his wages. The question of profit arising from these payments does not arise; but if it did, it is clear that there must be some saving to the

(1) [1896] 1 Q. B. 453. (2) [1901] 1 K. B. 86.
(3) [1901] 1 K. B. 93.

C. A. 1903

SHARPE v. MIDLAND RAILWAY.

guard, and, if so, it cannot be necessary to discriminate as to the quantum of profit.

[They referred to *Nelson* v. *Kerr*. (1)]

Hugo Young, K.C., in reply.

Cur. adv. vult.

May 4. STIRLING L.J. read the following judgment:—This is an appeal by the Midland Railway Company from the decision of his Honour Judge Lindley, as arbitrator under the Workmen's Compensation Act, 1897, holding that the earnings of a deceased railway guard in the employment of that company included certain sums paid to him, in addition to his ordinary wages, under the name of "lodging allowance." The facts are very clearly stated in an excellent written judgment of the learned judge, and it is unnecessary to state them in detail. It appears that railway guards in the course of their duty have frequently to lodge away from home, and on these occasions are, under the terms of their employment by the Midland Railway Company, entitled to receive the allowances in question, which are made on the following scale: If the guard lodges in lodgings provided by the company he is allowed 1*s.* in the country or 1*s.* 6*d.* in London. If he finds his own lodgings he is allowed 2*s.* in the country or 3*s.* in London. The object of the allowances is to cover out of pocket expenses to which a guard is put through having to sleep away from home; and the judge finds as a fact that the amount of the allowance is about equal to the reasonable cost of board and lodging (or board only if the company's lodgings are used) for the time covered by the allowance. But it also appears that no inquiry is ever made by the railway company as to the actual expenses incurred by a guard, and it was admitted that, if a guard lodged with and was boarded by a friend or relative, without incurring any expense, he would be entitled to the lodging allowance. The question whether in these circumstances the allowance is to be treated as a repayment of out of pocket expenses or as an addition to wages is one of some nicety; but I find myself unable to differ from the reasoning and conclusions of the learned judge. The allowance is a pay-

(1) (1901) 3 F. 893.

ment to which the guard becomes entitled (no less than to his weekly wages) upon the happening of certain events, whether he has incurred out of pocket expenses or not. He is in no way liable to account to the company in respect of the money he receives, which is as much his own as his weekly wages. The bargain between the guard and the company is that the former is at his own expense to provide himself with the ordinary necessaries of life, and, so far as the allowance is made in respect of food, it constitutes an addition to his resources; for, as I understand the finding of the judge, the amount of allowance covers the whole of the reasonable cost of board while the guard is away from home, and not merely any extra cost occasioned to him during that period, so that the domestic establishment is thus relieved from the expense of providing food for the guard in his absence. The allowance, therefore, appears to me to form part of the workman's earnings, although the amount of it may have been calculated by reference to the probable amount of his expenditure on board and lodging. It was strongly urged upon us that the whole of the allowance ought not to be treated as earnings, but only so much as might be shewn to constitute profit in the hands of the workman; but to give effect to this contention would be to embark on an inquiry not contemplated by the Act, which prescribes that the compensation shall be assessed simply by reference to the amount of the workman's earnings at the time of his death, without any investigation as to the mode in which he applied them when received. For these reasons, and also for those given by the learned judge, I think that the appeal fails and ought to be dismissed.

I may add that the Master of the Rolls agrees with this judgment.

MATHEW L.J. I have had an opportunity of reading the judgment of the Lord Justice, with which I entirely agree.

Appeal dismissed.

Solicitor for applicant: *A. Toovey, for Flint & Son, Derby.*
Solicitors for respondents: *Beale & Co.*

A. M.

1903
April 29.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* HINCHCLIFFE.

Railway—Passenger—Fare—Passenger travelling on after giving up Ticket at Station for which it is available.

The defendant, intending to travel by a particular train from H. to M. on the plaintiffs' railway, took a ticket to S., an intermediate station, and after giving up this ticket on the arrival of the train at S., remained in the carriage and tendered to the plaintiffs' servants 7*d.*, which was the amount of the fare from S. to M.—the difference between the fare from H. to S. and the through fare from H. to M. being 9*d.* The plaintiffs refused the amount tendered, but allowed the defendant to travel on in the same train to M., and sued him for the excess through fare:—

Held, that the plaintiffs were entitled to recover.

APPEAL from the Huddersfield County Court.

The defendant, intending to travel to Manchester by the direct through train, took a ticket at Huddersfield for Stalybridge, for which he paid 1*s.* 6*d.* On the arrival of the train at Stalybridge he gave up this ticket, and without leaving the carriage expressed his intention of going on to Manchester, and tendered the sum of 7*d.*, which, in consequence of a competing railway system from that town to Manchester, was the correct fare from Stalybridge to Manchester. The ticket collector, however, demanded the sum of 9*d.*, being the difference between the 1*s.* 6*d.* paid by the defendant and 2*s.* 3*d.*, which was the through fare from Huddersfield to Manchester, and refused to accept the 7*d.* tendered by the defendant. The defendant was, however, allowed to travel in the same carriage to Manchester, and the plaintiff company sued him for the sum of 9*d.* in the county court. The defendant paid 7*d.* into court, and contended that that was all that was due from him. The county court judge gave judgment for the plaintiffs, and the defendant appealed.

The ticket purchased by the defendant from Huddersfield to Stalybridge contained words stating that it was issued subject to the rules and regulations of the railway company. Among

the general regulations and conditions of the railway company were the following:—

"*Using Ticket for any other Station.* Any passenger using or attempting to use a ticket for any other station than that for which it is available will be required to pay the difference between the sum actually paid and the fare between the stations from and to which the passenger has travelled, or, at the option of the company, the fare from the station to which he has booked to the end of his journey."

"*Tickets* must be shewn to the company's servants, and delivered up to them when demanded . . . . Parties cannot rebook at an intermediate station by the same train. No tickets will be issued after a train is in sight at an intermediate station."

Lowenthal, for the defendant. The only contract between the plaintiffs and the defendant was the contract to carry him from Huddersfield to Stalybridge, and that came to an end when he gave up his ticket at Stalybridge. The plaintiffs might then have insisted on the defendant's leaving the train; but they did not do so, but elected to accede to his wish to be carried on from Stalybridge to Manchester. They are, therefore, only entitled to sue him as on a quantum meruit, and that must be at the rate of the fare from Stalybridge to Manchester, that is to say, 7*d*. The defendant did not break any of the plaintiff company's regulations or conditions, since he gave up his ticket at Stalybridge, and did not rebook there, but merely remained in the train. The company chose to carry him on, and cannot insist that they did so subject to the conditions referred to on the ticket which he had given up at Stalybridge. [He referred to *Great Western Ry. Co.* v. *Pocock* (1); *London and Brighton Ry. Co.* v. *Watson* (2); *Great Northern Ry. Co.* v. *Palmer*. (3)]

Shearman, K.C. (*Eustace Hills* with him), for the plaintiffs. The contract was a contract to carry the defendant through from Huddersfield to Manchester, and the defendant was either

(1) (1879) 41 L. T. (N.S.) 415. (2) (1879) 4 C. P. D. 118.
(3) [1895] 1 Q. B. 862.

1903

LONDON AND NORTH WESTERN RAILWAY v. HINCHCLIFFE.

bound to pay 2*s.* 3*d.* for a ticket for the whole journey, or to pay the difference between the fare he actually paid and the fare for the whole journey. The ticket which he took was issued subject to the conditions and regulations of the company, and by those he was forbidden to use the ticket for any station other than that to which it was issued, and also to get out and rebook at Stalybridge. He intended to travel through to Manchester, and it must be taken that the railway company only conveyed him from Huddersfield to Manchester on the condition that he paid the through fare between those stations.

[He was stopped.]

LORD ALVERSTONE C.J. In this case, whatever may be the result of other proceedings, I think the judgment of the county court judge was right. The company were really suing on a quantum meruit for the amount due to them from the defendant for having carried him from Stalybridge to Manchester after having waived the tort, and allowed him to remain in the carriage although he had not a ticket for this journey. They were entitled to do this; but having carried him on, the question is whether or not the amount due on a quantum meruit under those circumstances is limited to the 7*d.* which is the local fare from Stalybridge to Manchester, or whether they are entitled to charge the excess fare of 9*d.* It seems to me the local fare from Stalybridge to Manchester is only applicable to the matter of a contract with a person who has booked from Stalybridge to Manchester, and, apart from any rights the passengers may have under the Railway and Canal Traffic Act, it cannot be said that the person who has come to Stalybridge from Huddersfield in a train intending to travel on to Manchester, and who has remained in the train, and who has never rebooked, and has therefore chosen to avail himself of a contract which the company held out to carry passengers by that train at the fare of 2*s.* 3*d.* from Huddersfield to Manchester, is entitled to say, "I claim to be in the same position as a person with whom the company has made a contract to carry him from Stalybridge to Manchester." It may be that, by getting out of the train at Stalybridge and persuading the

booking clerk to issue a fresh ticket to him, a man may give up his ticket at Stalybridge and take a fresh one and be able to go on; but that is not the case here. We have to deal with the case of a man who intended to travel by train from Huddersfield to Manchester, a journey for which the fixed fare is 2*s.* 3*d.*, and who avails himself of the facilities offered by that train, and then says, "The measure by which I am to be charged for the portion of the journey from Stalybridge to Manchester is the rate at which I should have been charged had I booked by that same train from Stalybridge and not from Huddersfield." I think it was quite open to the county court judge to find that, in that case and under those circumstances, the measure of the quantum meruit was the difference between what the passenger would have had to pay had he originally taken a ticket from Huddersfield to Manchester and what he did pay when he took a ticket from Huddersfield to Stalybridge. Of course it will be understood that I have decided this case upon the assumption that the conditions which prohibit rebooking by that train form part of the contract, and, therefore, the passenger was doing something which the railway company by their conditions prohibited him from doing. The conditions further prohibit him from using the Stalybridge ticket for any station except Stalybridge.

Our decision to-day will not prevent the parties from taking proceedings, if they can take any such proceedings, under the Railway and Canal Traffic Act, 1854, and the Acts amending it. I think this was the proper measure of the quantum meruit to be paid by the passenger for the journey for which he was carried by the company from Stalybridge to Manchester. The judgment of the county court judge must be affirmed.

WILLS J. I am of the same opinion. I am inclined to think it does not make any difference whether the passenger originally intended to book for Manchester or only for Stalybridge, because when he elected to stay in the train at Stalybridge and go on in that train without rebooking, he elected to propose to the company that they should make it one through journey for

1903

LONDON AND NORTH WESTERN RAILWAY v. HINCHCLIFFE.

him from Huddersfield to Manchester; and if so then the company, by accepting that altered state of things, instead of turning him out and requiring him to rebook, made a further contract that they would carry him the whole distance from Huddersfield to Manchester, and therefore were entitled to charge the whole fare.

CHANNELL J. I am of the same opinion. When you look at the matter, the company's fare for the passenger who travels through from Huddersfield to Manchester in the same train, and does not get out and rebook at Stalybridge and start on a fresh journey from that station, is 2*s.* 3*d.*, and I see no reason why, if a gentleman does not make a fresh contract with the company but acts as if he were a through passenger, he should not be charged that fare.

Appeal dismissed.

Solicitor for plaintiffs: *C. de J. Andrewes.*

Solicitors for defendant: *James Mellor & Co., for Learoyd & Co., Huddersfield.*

A. P. P. K.

CRANE & SONS *v.* ORMEROD.

1903
May 6.

County Court—Execution—Seizure of Goods not the Property of Judgment Debtor—No Claim made by Owner—Sale—Title of Purchaser—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 154.

Where goods are taken in execution by the bailiff of a county court, and, no claim having been made to them, are sold by the bailiff, and it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner.

Goodlock v. *Cousins*, [1897] 1 Q. B. 348, 558, distinguished.

APPEAL of the defendant from the county court of Lancashire holden at Chorley.

The facts were as follows: A judgment having been recovered against one Woodward in the county court, execution was issued against his goods, and, amongst other things, a piano was seized by the high bailiff. The piano did not in fact belong to Woodward, but to the plaintiffs, by whom it had been lent to Woodward on the hire-purchase system. The plaintiffs, being unaware that the piano had been seized, made no claim to it. The bailiff advertised the piano for sale, and ten days after the seizure it was bought by the defendant bonâ fide, and without notice that it was not the property of Woodward. The plaintiffs subsequently brought this action against the defendant to recover possession of the piano. The county court judge gave judgment for the plaintiffs. The defendant appealed.

Compton-Smith, for the defendant. On a sale by the bailiff of a county court of goods taken in execution the purchaser gets a good title, and if it subsequently appear that at the time of the sale the goods were not the property of the judgment debtor, but of some third person, the purchaser is not liable in an action brought by that third person to recover the goods.

[LORD ALVERSTONE C.J. In the case of a sale by the sheriff,

1903

CRANE & SONS v. ORMEROD.

after execution issued out of the High Court, the purchaser does not get a good title if the goods are not the property of the judgment debtor.]

No; but the position of a county court bailiff, which is governed solely by the County Courts Act, 1888, is different. That Act contains a series of sections forming a code dealing with execution. By s. 146 execution is to be issued against the goods of the debtor, and by s. 147 the bailiff is directed to seize the goods of such person. Then s. 154 deals with a sale by the bailiff. This section refers to "any goods" which shall be "taken in execution," and in s. 155 the expression is "the goods and chattels of any person whomsoever," neither section being confined to the goods of the judgment debtor, as is the case under ss. 146 and 147. Sect. 156 provides the procedure to be followed where a claim is made to "any goods taken in execution." Those words clearly refer to goods upon which execution has actually been levied, whether belonging to the debtor or not. The section directs the bailiff in certain events, after a claim has been made, to sell, not merely the debtor's rights in the goods, but the goods themselves, "as if no such claim had been made." The effect of these words is to put a sale by the bailiff after a claim has been made on the same footing as a sale where there is no claim; and it was decided in *Goodlock* v. *Cousins* (1) that where a claim is made and the claimant fails to make a deposit or to give security, as required by s. 156, the sale by the bailiff gives a good title to the purchaser, although the goods are in fact the property of the claimant. It follows, therefore, that where no claim is made the purchaser also gets a good title. A sale which does not confer a title is, as was pointed out in *Goodlock* v. *Cousins* (1), not a sale of goods, but of a lawsuit. The county court judge, therefore, was wrong in holding that in the present case the purchaser did not acquire a good title as against the plaintiffs.

Rigby Swift, for the plaintiffs, was not called upon to argue.

LORD ALVERSTONE C.J. The proposition that has been put forward on behalf of the defendant in this case is somewhat

(1) [1897] 1 Q. B. 348, 558.

startling. Sect. 147 of the County Courts Act, 1888, directs the bailiff executing any process of execution issuing out of a county court to "seize and take away any of the goods and chattels of such person"—that is, the judgment debtor. Then follow a number of sections dealing with the goods seized, and in particular s. 154, which regulates the sale by the bailiff. But it is quite clear that in all these sections it is the goods of the judgment debtor which are referred to. The whole procedure depends upon that fact. Sect. 156 deals with cases where the goods which have been seized are claimed by some other person, and it is contended that, because in certain events the bailiff has power under that section to sell and to substitute the proceeds of the sale for the goods, a sale by the bailiff must in all cases give a good title to the purchaser. The case of *Goodlock* v. *Cousins* (1) which has been referred to was a case where a claim had been made and the goods had been sold by the bailiff under s. 156; but the decision is no authority for the proposition that, where no claim has been made and the bailiff sells, the purchaser gets a good title against the real owner of the goods. I am of opinion that there is no foundation for the argument which has been addressed to us, and that the judgment of the county court judge was right. The appeal will therefore be dismissed.

WILLS J. I am of the same opinion. There can be no reason in the nature of things why a sale by the bailiff of the county court should give a title, whereas a sale by the sheriff in the High Court gives none. No doubt under s. 156 there may be a sale of goods which are not the property of the judgment debtor, but belong to the claimant, because if the claimant fails to make the deposit or to give security the section directs that the bailiff shall sell the goods. That is very different from the present case. In *Goodlock* v. *Cousins* (1) this Court and the Court of Appeal held that the effect of the authority to sell given by s. 156 was that the purchaser got a good title. But that case is no authority for saying that,

(1) [1897] 1 Q. B. 348, 558.

1903

CRANE & SONS v. OMEROD.

where no claim is made and the goods are sold, the purchaser is to get a title.

CHANNELL J. I agree. I am unable to find any words in any section of the Act which can be interpreted as conferring upon the bailiff an authority to sell so as to give a title to the purchaser, except in cases under s. 156 where a claim has been made to the goods seized. In that case the purchaser gets a good title and the proceeds of the sale are paid into court, and by s. 157 the judge is to adjudicate between the parties—that is to say, the claimant and the execution creditor. But a purchaser where no claim has been made does not come within these sections.

Appeal dismissed.

Solicitors for defendant: *E. C. Rawlings & Butt, for J. H. Neville, Chorley.*

Solicitors for plaintiffs: *Norris, Allens & Chapman, for J. M. Quiggin & Brothers, Liverpool.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1903
May 1.

In re H. E. POLLARD.
Ex parte S. R. POLLARD.

Bankruptcy—Property of Bankrupt—Secured Creditor—Administration Action —Order for Payment into Court of Debt due by Defendant to Testatrix— Non-compliance—Sequestration against Defendant—Payment of Money into Court to "Account of Sequestrators"—Bankruptcy of Defendant— Title of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45.

The issue of a writ of sequestration to enforce an order for the payment of a debt into court, coupled with the receipt of money of the debtor by the sequestrator, does not of itself make the creditor a secured creditor within the meaning of the Bankruptcy Act, 1883.

An executor, who at the date of the death of his testatrix was indebted to her, was made defendant to an action in the Chancery Division brought by his co-executors for the administration of her estate. On the further consideration of the action an order was made that the defendant should pay into court to the credit of the action the amount which had been found due from him. He failed to obey the order, and on the application of the plaintiffs a writ of sequestration was issued against him. The order was served upon a bank with which he had an account, and an order was afterwards made directing the bank to pay into court to the credit of the action, "the sequestrators' account," the balance standing in their books to the credit of the defendant. This payment was accordingly made on August 6, and the same day a receiving order in bankruptcy was made against the defendant upon a creditor's petition presented on the previous July 13. He was afterwards adjudicated a bankrupt:—

Held, that the plaintiffs did not by virtue of the sequestration, or by the subsequent payment into court, become secured creditors of the bankrupt, but that the money in court had passed to the trustee as part of the property of the bankrupt divisible among his creditors.

Decision of Wright J. affirmed.

In re Hastings, (1892) 9 Morr. 234, approved and followed.

Per Romer L.J.: The effect and operation of a sequestration explained.

Semble, that if an order had been made that the balance of the fund, after payment of the sequestrators' costs, should be carried to the general credit of the action, the plaintiffs would have been in the position of secured creditors of the bankrupt.

APPLICATION by the trustee in the bankruptcy claiming, as part of the property of the bankrupt divisible among his creditors, a sum of money which had been paid into court in

C. A. 1903

POLLARD, *In re.* POLLARD, *Ex parte.*

an administration action in the Chancery Division under the following circumstances.

The action was brought on August 11, 1900, for the administration of the estate of Jane Pollard, who died on March 8, 1899. Her executors and trustees were the bankrupt and his brothers, B. Pollard and S. R. Pollard.

B. Pollard and S. R. Pollard were the plaintiffs, and H. E. Pollard the defendant. At the trial of the action on February 20, 1901, an inquiry was (inter alia) directed whether the defendant was indebted in any, and if so what, sum to the testatrix at the time of her death.

By his certificate, dated December 17, 1901, the master certified that the defendant was indebted to the testatrix at the time of her death in the sum of 136*l.* 3*s.*, and that this sum was still due to her estate.

On March 11, 1902, on the hearing of the action on further consideration, it was ordered that the defendant should, within seven days after service of the order upon him, pay the sum of 136*l.* 3*s.* into court to the credit of the action. The order was served on the defendant on April 25, 1902, but he failed to obey it. On May 20, 1902, on the application of the plaintiffs, an order was made for the issue of a writ of sequestration against the defendant, and on the same day the writ was issued. It was in the common form, authorizing and commanding the persons named in it as sequestrators to enter upon all the real estate of the defendant, and to collect not only the rents and profits thereof, but also all his goods, chattels, and personal estate, "and detain and keep the same under sequestration in your hands" until the defendant should lodge in court to the credit of the action the sum of 136*l.* 3*s.*, "clear his contempt, and our said Court make other order to the contrary." On the same day a copy of the writ was served by two of the sequestrators upon the manager of the Covent Garden branch of the London and County Banking Company, with which the defendant kept an account, and the sequestrators demanded payment to themselves of the balance then standing to the credit of the defendant in the books of the bank.

The manager said that he must consult his solicitor, and that as soon as he had obtained his advice he would communicate with the sequestrators, and that in the meantime he would not allow the defendant to reduce his balance or pay away any money on his account. At that time a balance of 204*l.* 7*s.* 5*d.* was in fact standing to the defendant's credit.

On May 22, 1902, two of the sequestrators again attended upon the bank manager, and served him with a formal demand in writing for payment over to them of the balance standing to the defendant's credit. The manager then consulted his solicitor, who said that the bank could not pay the money over without an order of the Court.

On the same day a summons in the action was issued by the plaintiffs against the bank, asking for an order for the payment of the balance into court.

By the evidence upon this summons it appeared that, after the service of the copy of the writ of sequestration on the bank manager, he had allowed the defendant's balance to be reduced, and that there then stood to his credit only the sum of 137*l.* 7*s.* 5*d.*

On the hearing of the summons in Court on July 5, 1902, an order was made by Joyce J. (1) that the bank should within four days after service make the payment into court directed by the lodgment schedule thereto. And it was referred to the taxing master to tax the costs of the sequestrators of the application. And it was ordered that the funds in court should be dealt with as directed by the payment schedule thereto.

The order was expressly made without prejudice to any proceedings which might be taken by the sequestrators against the bank in respect of the sum paid out by them from the amount standing to the credit of the defendant after service of the writ of sequestration on the manager.

The lodgment schedule directed the bank to lodge 137*l.* 7*s.* 5*d.* cash in court to the credit of the action, "the sequestrators' account"; and the payment schedule directed that out of the funds to be lodged as aforesaid the costs of the sequestrators to be taxed under the order should be paid.

(1) Vide W. N. (1902) 144.

C. A. 1903

POLLARD, *In re.* POLLARD, *Ex parte.*

This order was served upon the bank on August 2, 1902, and on August 6, 1902, between 12.30 and 1 P.M., they paid the money into court.

At the time when the order of July 5 was made the plaintiffs had no knowledge of any act of bankruptcy committed by the defendant; but in fact, on April 10, 1902, a bankruptcy notice had been served upon him. He failed to comply with the notice, and on July 13, 1902, a bankruptcy petition was presented against him, upon which, on August 6, 1902, between 2.30 and 3 P.M., a receiving order was made.

The defendant was afterwards adjudicated a bankrupt and a trustee was appointed. The taxed costs of the sequestrators having been paid, in accordance with the order of July 5, 1902, there remained in court to the credit of the action, "the sequestrators' account," the sum of 98*l.* 9*s.* 9*d.*

March 2, 9. *Hansell*, for the trustee. Under s. 10 of the Bankruptcy Act, 1883, this Court can restrain proceedings pending against the bankrupt in other Courts. The title of the trustee relates back to April 18, 1902. The sequestration proceedings were not commenced until May 20, and are not protected under s. 49 of the Act, as they were proceedings in invitum: *Courage* v. *O'Shea* (1); *Wild* v. *Southwood* (2); nor was the payment into court under the sequestration a completion of the execution within s. 45 of the Act: *In re Hastings* (3); *In re Browne* (4); *Butler* v. *Wearing* (5); *In re Trehearne.* (6) Even if payment into court was equivalent to receipt of the money by the sequestrators the execution was not completed before the date of the receiving order, because the money was only paid into court the same day.

Muir Mackenzie, for the sequestrators. It may be admitted that s. 49 of the Act does not apply, but the application is misconceived. The Court of Chancery now has this money under its control, and it is for that Court to decide who is entitled to it. Even if the trustee is entitled by relation back,

(1) [1895] 1 Ch. 325.
(2) [1897] 1 Q. B. 317.
(3) 9 Morr. 234.
(4) (1871) L. R. 12 Eq. 137.
(5) (1885) 17 Q. B. D. 182.
(6) (1890) 39 W. R. 116.

it is to that Court to which he ought to apply. *In re Hastings* (1) and *In re Browne* (2) do not apply. In neither of them had the sequestration proceedings gone so far as in the present case. Next, s. 45 of the Act does not apply; a sequestration is not a process at law like a fi. fa. It is a proceeding to compel obedience in cases of contempt by seizing property: Edwards on Executions, pp. 268–270; *Francklyn* v. *Colhoun* (3); and is not an execution or attachment within the meaning of the section. But if it is, the execution was completed, because the bank under the order paid the money into court to the separate account of the sequestrators.

Hansell, in reply.

WRIGHT J. It seems to me that I cannot get over the decisions in *In re Hastings* (1) and in *In re Browne*. (2) It is not necessary for me to repeat what is said in those cases. I will merely add that on the facts of this case there was an execution, and it was not completed before the date of the receiving order. The receiving order was made on August 6, and the money was paid into court on the same day; therefore, the payment was not before the date of the receiving order, because the receiving order takes effect from the beginning of the day. Taking the view I do of the effect of *In re Hastings* (1) and *In re Browne* (2), I think I should be doing wrong to send this case to the Chancery Division. Moreover, in this case the trustee has a higher title than the bankrupt, which is an additional reason for keeping the matter in the Court of Bankruptcy, which clearly has jurisdiction to deal with it. I think, therefore, that the trustee is entitled to succeed, and that there must be an order in the terms of the notice of motion.

H. L. F.

The plaintiffs appealed.

Danckwerts, K.C., and *Muir Mackenzie*, for the plaintiffs. The money was ordered to be placed to a separate account only because the taxed costs of the sequestrators were to be paid out of it.

(1) 9 Morr. 234. (2) L. R. 12 Eq. 137.
(3) (1819) 3 Swanst. 283, n.; 19 R. R. 204.

C. A. 1903

POLLARD, *In re.* POLLARD, *Ex parte.*

[ROMER L.J. The money was not carried to the general credit of the action.

COZENS-HARDY L.J. Is it not really the same thing as if the money were now in the pockets of the sequestrators?]

The sequestrators would hold the money as officers of the Court. It is submitted that the money has been "recovered" in the action, and that the plaintiffs' solicitors would have a statutory lien upon it for their costs. The money was in court to the credit of the action, though it was placed to a special account; but that is immaterial as regards persons who are not parties to the action. The bankrupt could not have dealt with the money. An order might have been made to carry over the balance after payment of the costs to the general credit of the action.

[ROMER L.J. But no such order was made.]

The trustee in a bankruptcy has no higher right than the bankrupt himself, unless some special right is given to him by statute or by the general law. The bankrupt could not have got this money out of court.

[ROMER L.J. If he had paid into court the 136*l.* which he had been ordered to pay, he would have been entitled to the money which the bank had paid in.]

It is submitted that as soon as the order was served upon the bank the plaintiffs became secured creditors of the bankrupt within the meaning of s. 9, sub-s. 2, of the Bankruptcy Act, 1883; after that the fund could not be dealt with except in accordance with the order. *In re Hastings* (1), upon which the learned judge relied, really supports the argument for the plaintiffs. In that case money had not been paid into court as in the present case. Here the balance in the bank was seized as soon as the order was served on the bank on August 2, and that was before the making of the receiving order. The plaintiffs were then in the position analogous to that of an execution creditor who has completed his execution by seizure and sale, and they are protected by s. 45. The money in court was subject to the order of the Court.

Hansell, for the trustee in the bankruptcy, was not called upon.

(1) 9 Morr. 234.

VAUGHAN WILLIAMS L.J. The appellants' counsel have urged all that can be said in support of the appeal, but, notwithstanding what they have said, it cannot, I think, be denied that in the circumstances of this case this money must be treated as being still in the hands of the sequestrators. The case does not differ in any way from that of money standing to the credit of the sequestrators at a private bank. The appellants must make out that in this state of things they became secured creditors of the bankrupt within the meaning of s. 9 or s. 45 of the Bankruptcy Act, 1883. A receiving order having been made, s. 9 provides that no creditor of the debtor in respect of a provable debt shall have any remedy against the property or person of the debtor in respect of the debt, unless he is a secured creditor. In my judgment the present appellants are not secured creditors. There is no pretence for saying that there has been anything equivalent to "seizure and sale" within the meaning of s. 45, nor can it be said that anything has happened which has appropriated this money to the appellants so that it could not be withdrawn. Under the circumstances, I am of opinion that the judgment of Wright J. was perfectly right, and that the appeal must be dismissed.

ROMER L.J. I am of the same opinion. But, having regard to the argument which has been addressed to us, it may be useful to make a few observations on the effect of an order for the issue of a sequestration. As a rule sequestration is only used as a process of contempt, in order to compel some one who has been guilty of contempt to purge his contempt. In special cases the process may be used when the act complained of is the non-payment of money by a debtor to his creditor. I have no doubt that a creditor, when the ordinary modes of execution are not efficacious, may apply for and obtain an order for a sequestration against his debtor. But when the sequestration issues and the sequestrators seize under it property of the debtor, what result follows? I need scarcely point out that the seizure by the sequestrators does not convert the property seized into the property of the creditor. The next question is,

C. A. 1903

POLLARD, *In re.* POLLARD, *Ex parte.*

Romer L.J.

Does the mere seizure by the sequestrators give the creditor a charge upon each part of the property of the debtor which has been seized? The answer must be, Clearly it does not. It does nothing of the kind. In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property. To my mind these propositions are now free from doubt. Therefore, in an ordinary case like the present, the fact that the sequestrators had sequestrated money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had any special charge thereon. He might have obtained a special charge by obtaining some special order having that effect. I think, therefore, that the only question is whether the payment of the money into court, under the circumstances of the present case, did give the appellants, who are no doubt in the position of creditors of the bankrupt, a special right to or charge upon the money so paid in. In my opinion, for the reasons which I will shortly state, the order for payment into court did not convert the money into the property of the creditors or give them any special charge upon it. The order was to pay the money, not to the general credit of the action, but to the special account of the sequestrators. That left the money as part of the debtor's property received by the sequestrators as sequestrators. Had the order gone on to say that, after payment of the costs of the sequestrators, the balance should be paid over to the general credit of the action, the result would have been different; but that was not done. Unfortunately for the appellants the order stopped short of that, and left the money in the hands of the sequestrators as part of the property of the debtor. There was no special charge, and no special right given to the appellants; the fund remained the property of the debtor, and on his bankruptcy it vested in his trustee.

COZENS-HARDY L.J. I entirely agree. The writ was issued under the Rules of the Supreme Court, Order XLII., r. 4, in

C. A. 1903

POLLARD, *In re.* POLLARD, *Ex parte.*

Cozens-Hardy L.J.

consequence of the failure of the debtor to comply with an order to pay a sum of 136*l.* 3*s.* into court. It is settled beyond doubt that a sequestration of this kind does not of itself create a security on the property seized in favour of the person who obtains the order. The money was not ordered to be paid to the creditors, but was ordered to be paid into court. It was settled, I think, a long time before *In re Hastings* (1), or at any rate by that case, that sequestration does not constitute a security, and that it is competent for the Court of Bankruptcy to restrain proceedings under a sequestration.

If that be so, it seems to me that the money must really be treated as in the sequestrators' pocket. The mere accident that the money happens to be standing to their credit in the books of the Paymaster-General can make no difference. It is equally an accident that the amount is so nearly equal to that which the debtor has been ordered to pay. In the absence of any further order, I can see no ground for holding that the money did not form part of the bankrupt's property which passed to his trustee.

Appeal dismissed.

Solicitors: *S. R. Pollard; Hicks, Arnold & Mozley.*

(1) 9 Morr. 234.

W. L. C.

BIBL. LONDIN UNIV.

C. A.
1903
April 3.

[IN THE COURT OF APPEAL.]

In re PILLING.
Ex parte BOARD OF TRADE.

Bankruptcy—Composition—Scheme of Arrangement—Withdrawals by Creditors—Releases by Majority of Creditors—Conditional Releases—Escrows—Composition payable to Minority of Creditors—Approval of Court—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

A debtor against whom a receiving order had been made submitted for the approval of the Court under s. 3 of the Bankruptcy Act, 1890, a proposed composition scheme consisting partly of releases which had been given him by two-thirds of his creditors of their debts under private arrangements made with them by himself, and partly of an intended payment of a composition of 7*s.* 6*d.* in the pound to the remaining one-third. The particular circumstances under which the releasing creditors had agreed to release their debts were not explained to the Court, and the releases themselves were not absolute in terms, but stipulated that if the proposed composition of 7*s.* 6*d.* in the pound should not be approved by the Court, or the receiving order not rescinded, the releases "shall have no force or operation":—

Held, that, having regard to the form of the releases and to the fact that the circumstances under which they had been obtained had not been submitted to the consideration of the Court as part of the scheme, the scheme was not one which the Court could approve.

In re E. A. B., [1902] 1 K. B. 457, explained and distinguished.

The observations on that case in *Re Baines*, (1902) 86 L. T. (N.S.) 691, disapproved.

On September 7, 1898, a receiving order was made against the debtor, John Robert Pilling, on a creditor's petition. In July, 1902, the registrar in bankruptcy refused to approve a scheme of composition submitted by the debtor, and an appeal by the debtor from that refusal was dismissed by the Court of Appeal, who, however, gave the debtor leave to hold a new first meeting of creditors. That meeting was held on October 16, 1902, when the debtor submitted a fresh proposal for a composition in the following terms: "(1.) That payment, in priority to all other of my debts, of all debts directed to be so paid in the distribution of the property of a bankrupt shall be provided for as follows: by deposit in cash with the official receiver before the date fixed for the hearing by the Court of this

application. (2.) That provision for payment of all the proper costs, charges, and expenses of and incidental to the proceedings, and all fees and percentages payable to the official receiver and the Board of Trade shall be made in the following manner: by deposit in cash with the official receiver before the date fixed for the hearing by the Court of this application. (3.) That the following composition shall be paid as hereinafter mentioned on all provable debts: 7*s.* 6*d.* in the pound in cash immediately on the proposal being approved by the Court. (4.) That such creditors as release their debts shall not be included in the payment of the said composition. (5.) That the payment of the composition be secured in the following manner: by deposit with bankers in cash of the necessary sum therefor in joint names before the date fixed for the hearing by the Court of this application, to be paid over to the official receiver for the purposes of the said composition forthwith on the approval by the Court of this application."

The particulars of the indebtedness were as follows:—

At the date of the receiving order the claims of creditors amounted to 246,343*l.*, of which through the exertions of the debtor claims amounting to no less that 160,176*l.* were expunged by order of the Court after proceedings which occupied a considerable time. After deducting certain other claims that were not expected to rank, the total amount of debts due at the date of the receiving order was 76,671*l.* Of this amount there was due to creditors who relied on their securities, the sum of 55,979*l.*, leaving a balance of 20,692*l.* as the final indebtedness. Of those creditors for 20,692*l.*, some had, since the date of the receiving order, released their debts to the amount of 13,389*l.*, thus leaving a total sum of 7303*l.* on which the composition of 7*s.* 6*d.* in the pound would be payable, and that composition amounted to 2738*l.* At the creditors' meeting of October 16, 1902, the proposed scheme of composition was adopted by a slight majority of the creditors present. The 2738*l.*, the amount of the composition of 7*s.* 6*d.* in the pound, was then duly deposited with bankers in joint names.

On February 6, 1903, the official receiver made his report

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

upon the circumstances leading up to the bankruptcy and upon the proposed scheme of arrangement, and, after going into the facts of the case in considerable detail, he objected to the scheme on several grounds, but mainly on the following: (1.) That it was an abuse of the process of the Court, inasmuch as the proportion of withdrawn claims to the ranking indebtedness was too large—*In re Utley* (1)—the proposed composition being on about 16 per cent. only of the liabilities that would rank in bankruptcy. (2.) That it was a sham, inasmuch as the proposal had in fact been only carried by the votes of creditors who had no substantial interest therein, and against the wishes of a hostile minority, the facts being that at the meeting seven creditors were present, of whom four were in favour of the scheme. Of these four three had no substantial interest in the proposal, one, a creditor for over 5000*l.*, being fully secured, and the other two being friends of the debtor who, as he had stated on oath at his public examination, were providing the money for payment of the composition, the result being that there was only one bonâ fide creditor, whose debt amounted only to 103*l.*, in favour of the scheme; and (3.) That the releases of the withdrawing creditors were not absolute, inasmuch as it was stipulated that the debts should revive in the event of the Court not approving the scheme, so that in that event the releasing creditors would have debts provable under s. 37, sub-s. 3, of the Bankruptcy Act, 1883: consequently the scheme did not comply with the provisions of s. 3, sub-s. 9, of the Bankruptcy Act, 1890. He finally reported (1.) that the debtor had contracted two of his debts without any reasonable expectation of being able to pay them; and (2.) that he had brought on his bankruptcy by rash and hazardous speculation in connection with a Turkish railway concession.

The releases given by the withdrawing creditors to the amount of 13,389*l.* were contained in one deed, which was under seal and executed by them to the following effect. The deed was dated April 21, 1902, and was made between the debtor of the one part, and the several persons, companies, and partnership firms, being some of the creditors of the debtor,

(1) (1901) 17 Times L. R. 349.

whose names were set out in the schedule thereto, and who were thereinafter called "the said creditors," of the other part. After reciting the presentation of the bankruptcy petition and the making of the receiving order, and that at a meeting of creditors on January 30, 1902, the statutory majority of creditors approved of a proposal for a composition of 7*s.* 6*d.* in the pound upon all provable debts, certain creditors releasing: "And whereas the parties hereto of the second part have, in order to facilitate the payment of the said composition, agreed with the said debtor to absolutely release their debts: Now this indenture witnesseth that in pursuance of the said agreement in this behalf, and in consideration of the release herein contained, and of the said proposed composition of 7*s.* 6*d.* in the pound on all provable debts, the said creditors do hereby respectively release and discharge the debtor from all debts due from him to the said creditors respectively, and from all actions, proceedings, claims, and demands in respect thereof: Provided always, and it is hereby expressly agreed and declared that if the said proposed composition of 7*s.* 6*d.* in the pound, or any other proposal for a composition involving payment of 7*s.* 6*d.* in the pound, shall not be approved by the Court, or the receiving order shall not in any other manner be rescinded, then these presents shall have no force or operation."

On February 26, 1903, the scheme adopted at the creditors' meeting of October 16, 1902, came before the registrar for his approval under s. 3 of the Bankruptcy Act, 1883, upon the debtor's application, when, after hearing arguments from counsel for the debtor and for two opposing creditors, the registrar made an order approving the scheme and discharging the receiving order.

From the order so made by the registrar the Board of Trade appealed.

The Attorney-General (*Sir R. Finlay, K.C.*) and *Muir Mackenzie*, for the Board of Trade. The proceedings on a proposal by a debtor for a composition or scheme of arrangement are laid down in s. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), which empowers the Court to approve

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

or refuse to approve the proposal, and it is under that power that the registrar has made the order now in question. The order is wrong in approving an arrangement the essential part of which consists of releases given by a large body of creditors, which releases are not absolute, but provisional only, for they are to have no effect if the scheme is not carried through. According to *In re Utley* (1) the proportion of withdrawals to the total original indebtedness must not be so great as to reduce the proposal to an abuse of the process of the Court; and the figures here shew that the present proposal is such an abuse. It appears from the elaborate report of the official receiver that the debtor has contracted debts without any reasonable expectation of his being able to pay them, and also that he has brought on his bankruptcy by rash and hazardous speculation. Under s. 8, sub-s. 3 (*d*) and (*f*), of the same Act these grounds are sufficient for the Court refusing or suspending his discharge. It is an abuse of the process of the Court for a debtor to settle privately with the majority of his creditors, as the debtor has done here, and then force the minority into Court to accept a composition. To render a scheme of arrangement such as the Court can approve, the whole of the details must be brought before the Court, the clear intention of the Act being that the Court shall control the scheme for the benefit of the whole of the creditors—that the whole of the creditors shall be settled with. Here the terms under which the withdrawing creditors agreed with the debtor to give these provisional releases were not submitted to the Court at all.

In *In re E. A. B.* (2), upon the authority of which the registrar seems to have decided this case, the Court did, no doubt, sanction a scheme under which certain creditors withdrew and released their debts; but there the withdrawals were not, as they have been here, obtained by the debtor, but they were obtained without his knowledge; and, moreover, the releases were absolute, and not merely provisional. It would be a strong thing for the Court to allow s. 3 to be made use of when, as here, the debtor himself makes a private

(1) 17 Times L. R. 349, 351. (2) [1902] 1 K. B. 457.

arrangement with certain of his creditors. Sub-ss. 8 and 9 (1) should be read together: the Court will not approve a scheme unless it provides sufficient security for payment of not less than 7*s.* 6*d.* in the pound on all unsecured "debts provable"; and here the debts of the withdrawing creditors will be among the "debts provable" should the scheme not be approved. The intention of the Act is that on a proposal for a scheme of arrangement all the effective creditors shall be before the Court, not that any shall be able to withdraw their debts by some private arrangement with the debtor. And certainly where, as here, a large proportion of creditors are arranged with privately under releases which are dependent upon the scheme going through, that is not a scheme which the Court will approve. A debtor cannot bargain with his creditors outside the Court. The object of the Legislature is to secure equality among the creditors. *Re Baines* (2), which was also apparently relied on by the registrar, does not apply. There the attention of the Court was directed to creditors voting; but here there is a much broader question, namely, whether the Court should sanction such a scheme as this.

[COZENS-HARDY L.J. I do not think the learned judges in that case appreciated the effect of the decision in *In re E. A. B.* (3), which certainly did not decide what Phillimore J. says it did.]

In re E. A. B. (3) unquestionably never decided that, in order to carry through a scheme of arrangement, a debtor may make a private arrangement with a creditor to have a particular debt withdrawn. The whole scheme must be brought before the Court for approval: *In re Dixon and Cardus.* (4)

(1) Sub-s. 8: "If the Court is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required where the debtor is adjudged bankrupt to refuse his discharge, the Court shall refuse to approve the proposal."

Sub-s. 9: "If any facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the Court shall refuse to approve the proposal, unless it provides sufficient security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate."

(2) 86 L. T. (N.S.) 691.

(3) [1902] 1 K. B. 457.

(4) (1888) 5 Morr. 291, 295.

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

Herbert Reed, K.C., and *P. M. Francke* (*Carrington* with them), for the debtor. Nothing is said in the Act about "equality" among creditors, though, no doubt, any scheme of arrangement involving inequality has to be considered by the Court, but inequality does not necessarily make the scheme bad. If the contention on the part of the Board of Trade is right, a man may owe debts amounting only to 100*l.* outside a large debt to his father, and yet, although the father may say he does not claim the debt, and himself finds the money for the composition, the son cannot arrange with the creditors for 100*l.* In *In re E. A. B.* (1) it was held that in considering a scheme debts absolutely released are not to be taken into account, whether those releases have been arranged by the debtor himself or not. The decision puts no sort of limitation on the person by whom a release is obtained. The case only decided that a composition under which one set of creditors get more than their share is invalid. It is a clear decision that released debts are not to be taken into account. *In re Utley* (2) shews that "debts provable" under s. 3, sub-s. 9, mean debts provable at the time the scheme comes before the Court for approval, and not at the date of the receiving order. In *In re E. A. B.* (1) the withdrawal was of 75 per cent. of the indebtedness, and yet that was not suggested to be an abuse of the process of the Court. Here, by the debtor's own exertions, he has succeeded in getting expunged upwards of 160,000*l.* worth of debts.

[ROMER L.J. The release here is not absolute in the first instance. It provides that, if the composition is not approved or the receiving order rescinded, the release "shall have no force or operation."]

It was not suggested before the registrar that this release is not effectual, and it is in fact an absolute release.

[ROMER L.J. It is not so in form. A release which, if a certain thing is not done, "shall have no force or operation," must surely be construed as a release that is to take effect only in that event.]

It must be taken to mean, "I am willing, if you effect a

(1) [1902] 1 K. B. 457. (2) 17 Times L. R. 349.

composition, to release my debt altogether; but if you do not effect a composition, my debt remains."

[ROMER L.J. There appear to me to be several objections to this scheme. First, there is no actual release in form; secondly, you have a large number of creditors settled with, and the terms of the arrangement with them are not before the Court; thirdly, on the very face of this release, it is itself a part of the scheme of arrangement, so that the real scheme is not before the Court: you have brought only part of the scheme before the Court, and not the whole. We do not know at present how the releases were obtained.]

But these releases were not impeached before the registrar. He would not have approved of the composition unless he had been satisfied of their validity.

[ROMER L.J. This should not be construed as a release at all: it is nothing more than a covenant not to sue for a limited period: *Newington* v. *Levy*. (1)]

It is a mere question of terms: the effect is that, at the time the scheme comes before the Court for approval, there is an absolute covenant not to sue.

[ROMER L.J. It is nothing more than a provision that, if the composition goes through, then the creditor will not sue.]

The deed is in the nature of an escrow; it is, upon any construction, to take effect on a certain event, and that was so held in *Re Baines*. (2) Pending that event, the creditor would be restrained from suing.

COLLINS M.R. This is an appeal by the Board of Trade from a decision of the registrar approving of a certain scheme of composition by the debtor under the provisions of the Bankruptcy Act, 1890, s. 3, and the point taken by the Board of Trade is that, on the details of the scheme, they are left in complete ignorance as to how, under certain releases, a large proportion of the claims to prove have been withdrawn. The Board of Trade say that on the face of this scheme, and on the face of the documents adduced as part of the scheme, there appear facts which, if unexplained, leave them in doubt as to

(1) (1870) L. R. 6 C. P. 180, 191. (2) 86 L. T. (N.S.) 691.

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

Collins M.R.

whether or not this scheme can be a legitimate scheme, and that they ought not to be called upon to approve a scheme where the debtor comes forward with facts which, on their face, are consistent with the scheme being one that could not be carried out, though possibly, on explanation, they may be consistent with the right to have the scheme carried out. The scheme which is now proposed is this. The debtor comes forward and says, "I propose to pay my creditors a composition. I will pay into court a certain sum for costs, and in addition a sum sufficient to pay a composition of 7*s.* 6*d.* in the pound to my creditors," and he says in the fourth paragraph of his proposal that such creditors as have released their debts shall not be included in the payment of the composition. Now it turns out that a very considerable percentage of the creditors have agreed to release their debts. I think the terms of the release are very important. It contains this clause: "Provided always, and it is hereby expressly agreed and declared that if the said proposed composition of 7*s.* 6*d.* in the pound, or any other proposal for a composition involving payment of 7*s.* 6*d.* in the pound, shall not be approved by the Court, or the receiving order shall not in any other manner be rescinded, then these presents shall have no force or operation." Therefore, that document which is part of the scheme shews on its face that there is not an absolute release—in fact, that there is only a release in a certain event which has not yet happened, namely, the approval of the scheme. The Board of Trade say, "This, on its face, is not a scheme that we can approve of. You are coming forward and averring as part of your scheme that you have procured an agreement simply for the purpose of assisting you in attempting to carry out this scheme—an agreement to hold in suspense the right in the creditor of proving for his debt until he finds out whether or not you are going to get that scheme passed or not, reserving the whole of his rights as a creditor in the event of your not getting that scheme passed." It seems to me that the Board of Trade are right in their contention, and I think the case may be tested in this way. Can the debtor claim to put himself in a better position by keeping back from the official receiver the special terms upon which

he has secured the assent of certain creditors? Can he be in a better position than if he had informed the official receiver at the outset as part of his scheme, and before he had carried out his arrangement with his creditors, what he proposed to do? It seems to me he cannot, and that if he had come forward with a scheme stating on its face that he proposed to bring about an agreement with a given percentage of creditors on the terms that they should approve provisionally a release of their debts subject to the composition being approved, and had stated all the facts, I do not think the official receiver or the Board of Trade would have been justified in accepting such a scheme.

Now it is said that the registrar who upheld this scheme really decided on the authority of the case of *In re E. A. B.* (1) in this Court. That appears to me to be the ground of his decision; but, when one examines the case of *In re E. A. B.* (1), it does not seem to me to support his view. It seems to me, with deference, that he has misapprehended the effect of that decision. There certain of the creditors of the debtor had arranged to release their debts, but they had made that arrangement, as the Court held, without the knowledge or privity of the debtor. They had arranged with a third person, acting entirely without his knowledge or consent, and in point of fact they had absolutely—not as part of the scheme, but absolutely and finally—released their debts, with the result that the only creditors left whose interests had to be considered were the creditors whose debts had not been so released. Now the decision in that case proceeded upon a totally different ground to the present, and in point of fact it shews, by the grounds upon which it was put, that had the arrangement in question been made, not by a third party without the knowledge of the debtor, but by the debtor himself, the decision of the Court would have been totally different. The decision was dealing with a case where another person entirely outside the debtor's knowledge had obtained releases from several of his creditors. That is not this case; and if the facts, as I have already said, were shewn on the face of this scheme, I do not

(1) [1902] 1 K. B. 457.

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

Collins M.R.

suppose for one moment the debtor could have asked for the assent of the Court. It was his duty to shew, on the face of the scheme, the terms upon which he was securing the release provisionally of these persons, and he is in no better position because he has kept those terms back.

There is another case that has been referred to as an authority for the proposition that a release in such terms as that called in the case an escrow is effectual as a complete release. That case was decided by my brothers Wright and Phillimore in the case of *Re Baines*. (1) The head-note is this: "In the absence of fraud the security required by the Bankruptcy Act, 1890, s. 3, sub-s. 9, need not extend to debts, releases for which have been executed and delivered as escrows, to take effect on the approval of the scheme by the Court; but the creditors who have executed such releases have no interest entitling them to vote upon the scheme." That decision again appears to me to have been arrived at upon a misapprehension as to the decision in the case I have already referred to, *In re E. A. B.* (2) It purports to be decided upon the authority of that case, but against the judgment of the learned judges. Wright J. said: "I confess that but for the passage cited to us from the case of *In re E. A. B.* (2) I should have thought that the requirement as to security being found for 7*s.* 6*d.* in the pound was inserted in the Bankruptcy Act of 1890 on the ground of public policy, for the very purpose of insuring that the debtor should not by means of private and piecemeal arrangements with friends escape the stigma and possible consequences of bankruptcy in a case where any misconduct was imputed to him, without securing 7*s.* 6*d.* in the pound on all the unsecured debts for which he was liable at the date of the receiving order." And he then held himself bound, contrary to his own judgment, by what he considers the result of the decision in *In re E. A. B.* (2) But when the latter case is examined, and the grounds which I have already referred to are considered, it is obvious that it lies entirely outside the principle which the learned judge seems to consider it established. It is not a decision that an escrow is equivalent to

(1) 86 L. T. (N.S.) 691. (2) [1902] 1 K. B. 457.

a release where it has been brought about by the debtor himself. To begin with, it is dealing not with an escrow at all, but with an absolute release, promoted not by the debtor, but by a person not acting with his privity. It therefore does not justify the decision in *Re Baines* (1); and, but for their view that it did justify it, the learned judges in that case would not have come to the decision they did come to.

The result is that this, being only, as I have said, a provisional release, leaves the debts with which it is dealing subject to proof; and on the face of it that is only another reason for saying that this scheme cannot hold water. It assumes on the face of the scheme itself an obligation to provide 7*s.* 6*d.* in the pound for all the creditors who can prove, whereas what it really proposes is to pay only those who have not gone through the form of release. Therefore the scheme is not a compliance with the terms of s. 3.

For these reasons I think that this scheme cannot be sanctioned, and that the decision of the learned registrar must be reversed.

ROMER L.J. I am of the same opinion. Seeing that the case of *In re E. A. B.* (2) has been misunderstood, as appears from what was said by the learned judges who decided the case of *Re Baines* (1), I think it right to add a few words upon the point in addition to what has been said by the Master of the Rolls. *In re E. A. B.* (2) decided two points: the first was that, where you find releases of debts brought about by arrangements to which the debtor was neither a party nor privy, he is not prevented from having a composition effected with the other creditors approved by the Court merely by reason of this arrangement which he did not bring about directly or indirectly. The other point of importance decided was this, that debts properly released between the date of the receiving order and the date of the composition under circumstances not touching the bankrupt need not be regarded in considering the scheme of composition. I should desire to add myself that I do not think it would be necessarily fatal to

(1) 86 L. T. (N.S.) 691. (2) [1902] 1 K. B. 457.

C. A. 1903

PILLING, *In re.* BOARD OF TRADE, *Ex parte.*

Romer L.J.

a scheme of composition that the debtor might have been party to it, or was aware that certain debts were released between the date of the receiving order and the composition. The case might be such as to shew that those releases were obtained under circumstances and under conditions which reflected in no way upon the debtor, and which might fairly be disregarded by the Court in considering whether it should sanction the composition. But what I do say is this—and this is what governs the present case—that if you find a debtor going about obtaining releases from a large body of his creditors under terms or possibly terms which are unexplained, and then you find he comes seeking to make a composition with the minority of his creditors who remain, then neither the Court nor the official receiver is bound to inquire into or ascertain the circumstances under which those releases were obtained, and the Court will not sanction the composition on the assumption that the releases were brought about without bargaining by the debtor or without some consideration or promise passing from him. The Court under these circumstances, I think, ought in the exercise of its discretion to refuse to accede to the scheme of composition; and especially so if the releases are conditional on the scheme being approved by the Court. That in itself is fatal to this case.

There is also another point which is fatal to the respondent on this appeal. Apart from the form of release which has been mentioned by the Master of the Rolls and which I need not again refer to, there is the fact that it appears from the recitals that the releases were part, as it were, of the scheme of composition, and that the circumstances under which those releases, or some of them, were obtained, were not fully and properly brought to the consideration of the Court as part of the scheme, as should have been done. In a case of this kind it is not sufficient for the debtor, as part of a scheme for settling with his creditors, to carry out part of his scheme by himself, and get releases, and then come to the Court and seek to obtain its sanction only with regard to the balance of the scheme. A scheme which is intended to settle with the

debtor's creditors ought to be brought before the Court as a whole and considered by the Court as a whole.

COZENS-HARDY L.J. I agree. It is not necessary to hold, and I do not hold, that an absolute unconditional release of a debt coupled with the withdrawal of a proof in no way dependent upon or connected with the composition scheme is a fatal objection to the scheme. But here it is apparent upon the face of the document itself that there was no absolute unconditional release of the debts; and I think it is equally apparent that the debtor was desirous of making an arrangement with all his creditors, as to 65 per cent. of them in terms the details of which we do not know, and as to 35 per cent. upon terms of paying them 7*s.* 6*d.* in the pound; and the Court, when asked to sanction the scheme, ought to have had before it not merely a proposal for the payment of the 7*s.* 6*d.*, but all the terms and arrangement as to dealing with the other 65 per cent.

I only wish to add one sentence about the case of *Re Baines*. (1) The decision in that case discharging the order approving of the scheme was, if I may say so, obviously right, but I cannot agree with the observations of Wright J. and Phillimore J., for, with great respect, I think they misunderstood the decision of this Court in the case of *In re E. A. B.* (2) There is nothing in *In re E. A. B.* (2) which in any way supports the view that releases executed as escrows to become operative only on approval of the scheme are to be put in any way on the same footing as absolute unconditional releases of debts obtained, not by the debtor, but by somebody else without the privity, knowledge, or consent of the debtor. For these reasons I think the appeal ought to be allowed.

Appeal allowed.

Solicitors: *The Solicitor to the Board of Trade; Emanuel, Round & Nathan.*

(1) 86 L. T. (N.S.) 691.

(2) [1902] 1 K. B. 457.

G. I. F. C.

1903
March 31.

ATTORNEY-GENERAL *v.* MURRAY AND ANOTHER.

Revenue—Estate Duty—Policy of Life Insurance—Marriage Settlement—"Interest purchased or provided by Deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*d*)—*Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48).

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (s. 2, sub-s. 1 (*d*)) "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

A father effected a policy of insurance in his own name on the life of his son, then aged eleven, to commence at the age of twenty-one, upon which ten yearly premiums only were to be paid; the father, who had no insurable interest in his son's life, paid all the premiums. After the son had attained the age of twenty-one, the father, with the approbation of the son and the son's intended wife, assigned to the trustees of the son's marriage settlement the policy of insurance and all moneys assured or to become payable under it upon trust after the son's death to invest the insurance moneys and pay the income to the wife for life. After the death of the son (who survived his father) the insurance moneys were paid by the insurance company to the trustees, who invested them in accordance with the trusts of the settlement:—

Held, that the sum paid under the insurance policy on the son's death was an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2, sub-s. 1 (*d*), and that on the death of the son estate duty was payable in respect of that sum.

Attorney-General v. *Dobree*, [1900] 1 Q. B. 442, and *Attorney-General* v. *Robinson*, [1901] 2 I. R. 67, followed.

Held, further, that, assuming that as between the father and the insurance company the policy was illegal and void under the Life Assurance Act, 1774 (14 Geo. 3, c. 48), for want of insurable interest, and that the insurance moneys were not legally recoverable, yet, the money having been in fact paid by the insurance company, the liability to estate duty was not affected by the illegality of the contract of insurance.

Worthington v. *Curtis*, (1875) 1 Ch. D. 419, discussed.

INFORMATION by the Attorney-General claiming estate duty.

On July 25, 1866, Sir Henry William Peek effected a policy for 10,000*l.* in his own name on the life of his son, Cuthbert Edgar Peek (who was born in 1855), to commence at the age

1903

ATTORNEY-GENERAL v. MURRAY.

of twenty-one years, with the Commercial Union Assurance Company. Ten premiums only of 357*l.* 18*s.* 4*d.* each were to be paid, the first on July 25, 1866, and the last on July 25, 1875, all of which Sir H. W. Peek duly paid. By the policy it was declared that the capital, stock, and funds of the company should be subject and liable to pay to the assured 10,000*l.* on proof of the death of Cuthbert E. Peek after attaining twenty-one years, and that the policy should entitle the holder to participate in profits; there was a proviso that the company under all their policies of insurance should be liable in the whole only to the extent of so much of their corporate assets as from time to time should be duly applicable for the satisfaction of their corporate liabilities, and with regard to the particular branch of their business—fire, life, or marine—in respect to which their policies might respectively relate.

In 1884 Cuthbert Edgar Peek was married to Augusta Louisa Brodrick, and by arrangement with his father he provided and brought into settlement certain property (including the moneys secured by the above-mentioned policy) as his fortune, and separate settlements of the husband's fortune and wife's fortune were executed. By the husband's settlement, which was dated January 2, 1884, and to which the husband, the wife, Sir H. W. Peek, and certain trustees (of whom the defendants were the survivors) were parties, it was recited that Sir H. W. Peek was entitled to the above-mentioned policy of assurance on the life of Cuthbert Edgar Peek for an original sum of 10,000*l.*, amounting then with bonuses to about 12,000*l.*, and that it had been agreed that Sir H. W. Peek should assign the policy and the moneys assured by or to become payable thereunder to the trustees; it was then witnessed that in pursuance of the agreement and in consideration of the intended marriage Sir H. W. Peek, with the approbation of Cuthbert Edgar Peek and Augusta Louisa Brodrick, assigned to the trustees the policy and all other moneys assured or to become payable by or under the same. It was then declared (inter alia) that the trustees should upon receipt of the policy moneys invest them and pay the income to Augusta Louisa Brodrick during widowhood (if she should survive her husband), with the usual

1903

ATTORNEY-GENERAL v. MURRAY.

trusts for the children or child or other issue of the intended marriage.

Cuthbert Edgar Peek (who had succeeded to the title on the death of his father in 1898) died on July 6, 1901, leaving his wife surviving. At his death there were large funds of the Commercial Union Assurance Company appropriated to the payment of life policies, and in part arising from accumulated profits. The company paid 14,196*l.* 17*s.* of their invested funds to the defendants, as trustees of the settlement, in respect of the policy and bonuses, and that sum was invested by the defendants and the income paid to Sir Cuthbert Edgar Peek's widow.

The Attorney-General, on behalf of the Crown, claimed that estate duty under the provisions of the Finance Act, 1894, s. 1, and s. 2, sub-s. 1 (*d*), both or either of them, became payable by the defendants on the sum of 14,196*l.* 17*s.* as property passing or deemed to pass on the death of Sir Cuthbert Edgar Peek.

Sir R. B. Finlay, A.-G. (*Vaughan Hawkins* with him), for the Crown. The first point taken by the defendants, that the policy, being effected by the father, who had no insurable interest in his son's life, was not enforceable against the insurance company, is untenable; it is a conclusive answer to such an objection that, whether the policy was enforceable or not, the insurance company has paid over the policy moneys to the defendants as trustees of the son's marriage settlement: *Worthington* v. *Curtis* (1), where Mellish L.J. says: "The statute is a defence for the insurance company only, if they choose to avail themselves of it. If they do not, the question who is entitled to the money must be determined as if the statute did not exist. The contract is only made void as between the company and the insurer." [He also cited on this point Lindley on Partnership, 4th ed. p. 202; 6th ed. p. 114.]

Secondly, the moneys produced by this policy are liable to estate duty under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894,

(1) 1 Ch. D. 419, at p. 424.

as being an interest purchased or provided by the son in concert or by arrangement with his father; the settlement is conclusive as to the provision having been made by them jointly; the policy moneys are therefore property passing on the death of the son: *Attorney-General* v. *Dobree* (1); *Attorney-General* v. *Robinson* (2), in which cases the reasons why policy moneys are property passing on the death of the deceased are discussed at length by Channell J. and Palles C.B. respectively. The funds of the company were appropriated for the purpose of paying their policies, and under the Life Assurance Companies Acts, 33 & 34 Vict. c. 61, s. 4, and 35 & 36 Vict. c. 41, s. 2, a separate account and a separate fund were kept in respect of life assurance policies. A policy-holder would clearly have been entitled to restrain the insurance company from selling their business to another company without providing out of their own assets for the payment of his policy: *Kearns* v. *Leaf* (3); the policy-holder (the father) therefore had an interest before the death of his son whose life was insured. [He also cited *In re State Fire Insurance Co.* (4)]

Danckwerts, K.C., and *R. J. Parker*, for the defendants. The Act must be construed strictly, and the transaction must come within the actual words of the section, not merely within its spirit: *Attorney-General* v. *Earl of Selborne* (5); *Attorney-General* v. *Lord Montagu.* (6) Even if the policy in the present case were valid, it was in no sense the son's policy; during his lifetime there was nothing in existence which could be the subject-matter of settlement, and the payment of the moneys to the trustees was in the nature of a voluntary settlement by the insurance company. The settlement of the policy was not provided by the son, either alone or in conjunction with his father. A policy of insurance is "a mere contract to pay a sum of money in consideration of an annuity": *Dalby* v. *India and London Life Insurance Co.* (7); it creates nothing more than a contract, and where there is no

(1) [1900] 1 Q. B. 442.
(2) [1901] 2 I. R. 67.
(3) (1864) 1 H. & M. 681.
(4) (1863) 1 D. J. & S. 634.
(5) [1902] 1 K. B. 388, at pp. 396, 399.
(6) [1903] 1 K. B. 483, at p. 489.
(7) (1854) 15 C. B. 365.

1903

ATTORNEY-GENERAL v. MURRAY.

insurable interest such a contract is void to all intents and purposes under 14 Geo. 3, c. 48, and cannot be treated as ever having had an existence. This policy gave no contractual rights against the moneys of the company, and when the marriage settlement was executed nothing passed, so far as the policy was concerned, to the trustees, for there was nothing to pass. This case is distinguishable from *Attorney-General* v. *Dobree* (1), and *Attorney-General* v. *Robinson* (2), for in both those cases the policy was clearly provided and settled by the deceased. *Worthington* v. *Curtis* (3) is not in point; there the policy was taken out by the father in the son's name: it was therefore not void on its face. Even assuming this policy to have been valid ab initio, there was no interest to pass at the date of the son's death, for the whole right to the policy was, and remained, in the defendants as trustees of the settlement. The son cannot be said to have purchased or provided the policy simply because his father chose to settle it on his wife and children. In all the decided cases the policy has been provided by the deceased himself, and the Crown can only be right if the expression "provided by the deceased in concert with another person" is equivalent to "provided by another person in concert with the deceased."

Sir R. B. Finlay, A.-G., in reply. The Court cannot go behind the conduct of the parties and see whether the insurance company was legally compellable to pay the policy moneys; the important point is that the estate of the deceased in fact got the benefit. There is no real distinction between *Attorney-General* v. *Dobree* (1) and the present case.

RIDLEY J. I am of opinion that the Crown is entitled to judgment. The case is practically governed by the decisions in *Attorney-General* v. *Dobree* (1) and *Attorney-General* v. *Robinson* (2), the only distinction which can be drawn between the present case and those decisions being, in my judgment, not material. The first point taken on behalf of the defendants was that this policy was not capable of being enforced against

(1) [1900] 1 Q. B. 442. (2) [1901] 2 I. R. 67.
(3) 1 Ch. D. 419.

the insurance company by reason of the provisions of 14 Geo. 3, c. 48; but that objection is disposed of by the fact that the money has been paid by the insurance company; the question is not as to the right of any person to recover on the policy, but as to the estate duty on money actually paid. I do not think the effect of the decision in *Worthington* v. *Curtis* (1) has been in any way got rid of by the argument for the defendant; that case shews that when the money has once been paid over by an insurance company it becomes subject to certain rights and obligations in the hands of the payee, although as between the insurer and the insurance company it would not be legally recoverable.

The present case falls within s. 2, sub-s. 1 (*d*), of the Finance Act, 1894; it is not necessary for me under the circumstances to consider whether it also comes within s. 1. If the policy had been on the life of the deceased, and he had himself paid the premiums, the case would have fallen within s. 2, sub-s. 1 (*c*), but it does not come with that branch of the sub-section as the premiums had to be paid by the father; it is clearly within sub-s. 1 (*d*), being an interest purchased or provided by the deceased in concert or by arrangement with another person. It is said that the interest was not purchased or procured by the deceased, because his father purchased or procured the policy and paid the premiums. This is true in fact; but if the settlement is looked at, we find a provision that "in pursuance of the said agreement in that behalf, and in consideration of the said intended marriage, the said Sir Henry William Peek, with the approbation of the said Cuthbert Edgar Peek and Augusta Louisa Brodrick, assigned unto the trustees all that the said policy on the life of the said Cuthbert Edgar Peek in the Commercial Union Office for the sum of 12,000*l.* and the said sum of 12,000*l.* and all other moneys assured or to become payable by or under the same," and the trustees were to hold the policy moneys, when received, upon the trusts of the settlement. I cannot help thinking it clear that in the case of such a marriage settlement, where the father provides

(1) 1 Ch. D. 419.

1903

ATTORNEY-GENERAL v. MURRAY.

Ridley J.

the money which is to be assured by the policy with the concurrence and approbation of his son, there is within s. 2, sub-s. 1 (*d*), an interest provided by the deceased, the son, in concert or by arrangement with his father. It is not necessary to construe the sub-section benevolently for the Crown in order to arrive at this result: it is the ordinary meaning of the language used. There is no other difference between this and the two cases I referred to other than the one suggested in argument, and which I overrule. It is unnecessary for me to go into the questions dealt with by Palles C.B. in *Attorney-General* v. *Robinson* (1) and Channell J. in *Attorney-General* v. *Dobree*. (2) It follows from what I have said that the duty must be aggregated.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Johnsons, Long & Co.*

(1) [1901] 2 I. R. 67. (2) [1900] 1 Q. B. 442.

W. J. B.

ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND AND OTHERS.

1903
March 30, 31;
April 21.

Revenue—Succession Duty—Disentailing Deed—Appointment to Purchaser in Fee—Alienation—Succession derived from Alienee—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

In 1868 the tenant for life of real estate and the tenant in tail in remainder joined in the execution of a disentailing deed by which the property stood limited to such uses as they should by deed jointly appoint. In 1870 they sold a portion of the land to a purchaser, to whom they jointly appointed and conveyed it. In 1874 the purchaser died, having devised the land to his wife, who died in 1888, after devising it to her daughter; the daughter paid succession duty on the value of her interest considered as an annuity. In 1899 the tenant for life died:—

Held, that upon the death of the tenant for life succession duty in respect of the succession of the tenant in tail became payable, notwithstanding the alienation of the succession and the disposition of the property by the alienee.

In re Cooper and Allen to *Harlech*, (1876) 4 Ch. D. 802, not followed.

INFORMATION by the Attorney-General claiming succession duty.

In the year 1816 certain estates in Northumberland and Middlesex (including the land comprised in the indenture of December 1, 1870, hereinafter referred to) stood limited to the use of Hugh, second Duke of Northumberland, for life with remainder to the use of his eldest son, afterwards third Duke, in tail male; and by virtue of two common recoveries suffered in 1816 and of indentures of lease and release in January, 1817, these estates became limited to such uses as the second Duke and his eldest son should jointly appoint.

By an indenture of settlement dated April 19, 1817, the second and third Dukes exercised their joint power of appointment, and limited the estates to uses under which, by reason of the events which happened, the estates in the year 1868 stood limited (subject to a term of years since satisfied) to the use of Algernon George, sixth Duke, for life with remainder to his eldest son, afterwards and now the seventh Duke and one of the defendants, in tail male.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

By an indenture dated December 19, 1868, duly enrolled as a disentailing assurance, the sixth and seventh Dukes disentailed the estates and conveyed them to such uses as the sixth and seventh Dukes should by deed jointly appoint, and in default to the uses then subsisting under or by reference to the settlement of 1817.

By an indenture of settlement dated December 21, 1868, the sixth and seventh Dukes, in exercise of the joint power of appointment given to them by the indenture of December 19, 1868, appointed the estates to such uses as they should jointly appoint by deed, and in default thereof to the use of the sixth Duke for life, with remainder to the use of the seventh Duke for life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over in strict settlement.

By indenture dated December 1, 1870, which recited (inter alia) the joint power of appointment in the settlement of December 21, 1868, the sixth and seventh Dukes, in exercise of that power and in consideration of the sum of 250*l.*, irrevocably appointed a certain parcel of land, being a portion of the estates, to the use of Lord James Murray in fee simple.

On June 3, 1874, Lord James Murray died, having by his will devised all his real and personal estate to his wife, Lady Elizabeth Murray, who was his sole executrix.

On October 11, 1888, Lady Elizabeth Murray died seised of the parcel of land, which she devised by her will to her daughter, the defendant Caroline Frances Murray, whom she appointed sole executrix. On the death of Lady Elizabeth Murray succession duty at 1½ per cent. was paid on the value of the interest of the defendant Caroline Frances Murray (considered as an annuity for life) in the real estate so devised to her by Lady Elizabeth Murray, including the land assured by the indenture of December 1, 1870.

By an indenture of settlement dated July 1, 1892, the sixth and seventh Dukes appointed the family estates to such uses as they and the present Earl Percy (the eldest son of the seventh Duke) should by deed jointly appoint; and by a further indenture of settlement, dated December 19, 1894, the sixth

and seventh Dukes and Earl Percy appointed the estates to such uses as the seventh Duke and Earl Percy should by deed jointly appoint, and in default of appointment to the use of the seventh Duke for life with divers remainders over.

The sixth duke died on January 2, 1899.

By an indenture dated May 13, 1902, the defendant Caroline Frances Murray sold and conveyed the particular land in question to the defendant Charles William Bell, who is now its owner. (1)

The information prayed for a declaration that succession duty under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, became payable on the death of the sixth Duke in respect of the land assured by the indenture of December 1, 1870, at the rate of 6½ per cent., that is to say, 5 per cent. under s. 10 of the Succession Duty Act, 1853, the present Duke being a descendant of a brother of the father of the third Duke, and 1½ per cent. under s. 21, sub-s. 1, of the Customs and Inland Revenue Act, 1888. The information further asked that the duty should be assessed on the principal value of the property by virtue of s. 18 of the Finance Act, 1894; but it was not contended during the argument that this section applied, and it was asked on behalf of the Crown that the duty should be calculated on the value of the interest considered as an annuity under s. 21 of the Succession Duty Act, 1853. (2)

(1) Bell was joined as a defendant for the purpose of enforcing the charge upon the property.

(2) By s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled."

By s. 15, "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title,

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

Sir R. B. Finlay, A.-G., and *Vaughan Hawkins*, for the Crown. The defendants, the Duke of Northumberland and Miss Murray, are personally liable under s. 44 of the Succession Duty Act, 1853, to pay succession duty upon the succession of the seventh Duke. The seventh Duke is liable as successor, and Miss Murray as the legal personal representative of Lord James Murray, who was the person in possession of the property when the succession became an interest in possession on December 1, 1870; alternatively, if the succession did not become an interest in possession until the death of the sixth Duke in 1899, Miss Murray is liable as the person then in possession of the property. Under the settlement of 1817, in the events which had happened, the estates stood limited in 1868 to the use of the sixth Duke for life with remainder to the seventh Duke in tail male, which conferred a succession on the seventh Duke as being a disposition by reason whereof he became beneficially entitled upon the death of the sixth Duke, within the meaning of s. 2 of the Succession Duty Act, 1853. Under s. 20 of that Act the duty in respect of this succession would not be payable until the successor became entitled in possession; but in the event of a prior alienation of the property the alienee is under s. 15 chargeable with duty at the same time and at the same rate as the person originally entitled

---

in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

would have been chargeable if there had been no alienation. The true effect of these sections is that in the present case the duty did not become payable, as but for s. 15 it would have been, by Lord James Murray upon the alienation to him, but that it became payable by the person in possession, the defendant Miss Murray, at the same time as the person originally entitled (the seventh Duke) would have become chargeable—that is, at the date of the death of the sixth Duke.

The case may be treated as one where the title to the succession has been accelerated by the surrender or extinction of a prior interest within the meaning of s. 15, for it was accelerated by the extinction of the life interest of the sixth Duke, and by virtue of that section the duty would be payable at his death, which is the time when it would have been payable if there had been no acceleration. Here the succession has been alienated, so far as regards this piece of land, and the liability to the duty in the case of the alienation of a succession is upon the person in possession of the property when the alienation falls into possession: *Solicitor-General* v. *Law Reversionary Interest Society*. (1) The alienation was effected by the joint act of the tenant for life in possession and the tenant in fee in remainder in conveying the property to Lord James Murray, and the duty in respect of that property became payable on the death of the tenant for life; it is immaterial whether the tenant for life predeceased or survived the alienee. It is true that a different view was taken by Jessel M.R. in *In re Cooper and Allen to Harlech* (2), who interpreted the expression "succession . . . . vested by alienation or by any title not conferring a new succession" as meaning "either by alienation or by any other title than alienation, in both cases not conferring a new succession"—that is, that the words "not conferring a new succession" qualified the word "alienation" as well as "any other title"; but that view was expressly disapproved by the House of Lords, and especially by Lord Herschell, in *Wolverton* v. *Attorney-General* (3), and should not be followed.

(1) (1873) L. R. 8 Ex. 233. (2) (1876) 4 Ch. D. 802.
(3) [1898] A. C. 535; 67 L. J. (Q.B.) 829.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

The result is that the defendants cannot rely on s. 15 as applying only to an alienation not conferring a new succession, and cannot set up the payment of succession duty on the death of Lady Elizabeth Murray as being a payment of duty on a new succession conferred by the alienation. The alienation of a succession does not affect the liability of the estate itself to succession duty, for the duty, whenever it becomes payable, is a charge on the estate; the only effect of the alienation is that a personal liability to payment of the duty is placed upon the person in actual possession of the property when the duty becomes payable.

Haldane, K.C., and *Danckwerts*, K.C. (*Austen-Cartmell* with them), for the defendants. The duty claimed is not payable, the only succession duty payable being that already paid by the defendant Miss Murray on the new devolution; the argument for the Crown involves the argument that two duties are payable, although there has only been one possession. It is true that where a tenant in fee in remainder joins with the tenant for life in a conveyance to a purchaser in fee simple, the purchaser would in an ordinary case be liable to pay succession duty on the death of the tenant for life. Apart from the effect of the disentailing deed of 1868, Lord James Murray would have been liable, had he survived the sixth Duke; but it is otherwise where the purchaser dies first and a new devolution or new succession from him comes into existence during the lifetime of the tenant for life. In such a case the heir or devisee of the purchaser is liable to duty in respect of a succession derived by him from his ancestor, the purchaser, and no further duty is payable on the death of the tenant for life, the original claim for duty being displaced by the new succession created by the purchaser's death: Hanson on Death Duties, 4th ed. p. 635. Whether there have in this case been two successions, in the seventh Duke and in Miss Murray respectively, there has been only one possession, and it is in respect of that alone that duty is payable. The true interpretation of s. 15 of the Succession Duty Act, 1853, is that the words "not conferring a new succession" are to be construed with the word "alienation" as well as with "any other

title"; on this point *In re Cooper and Allen to Harlech* (1) is not only an authority, but is a right decision, and, not having been expressly overruled, ought to be followed.

The effect of the disentailing deed of 1868 was to destroy the succession from the sixth Duke created by the settlement of 1817. The effect of that deed depends on the Fines and Recoveries Act, 1833, and was to give the tenant for life and tenant in tail a power of disposition which, when exercised, destroyed the estate tail and created a new statutory estate; but it is that estate tail, so destroyed, in respect of the succession to which, although it never fell into possession, the Crown is claiming succession duty. The rule laid down in *Solicitor-General* v. *Law Reversionary Interest Society* (2), that "if two constructions are open, and there is no preponderating reason in favour of either as a matter of construction, then the construction should be taken which imposes the lighter burden," is sound, and should be followed. Assuming, however, that the succession created by the settlement of 1817 remained in existence and came to Lord James Murray by alienation and through him to the defendant Miss Murray, duty is not payable by the latter upon her own life as though she were the successor. On the point of the alienee being the successor, the case of *Solicitor-General* v. *Law Reversionary Interest Society* (3) is no doubt against the defendants; but in that respect that decision is wrong, and must be taken to have been overruled by implication by the judgments in *Wolverton* v. *Attorney-General.* (4) If the succession under the settlement of 1817 survived, the true successor would seem to be the seventh Duke, and the duty, if payable at all, should be assessed under s. 21 as an annuity for his life. But he is under no liability to succession duty at all, for that liability only extends to property into the actual possession of which the successor comes, and where he conveys the estate to a purchaser the liability to duty, by virtue of s. 44 of the Act of 1853, travels with the succession, and is transferred to the alienee: Hanson on Death Duties, 4th ed. p. 706. In any

(1) 4 Ch. D. 802.
(2) L. R. 8 Ex. at p. 240.
(3) L. R. 8 Ex. 233.
(4) [1898] A. C. 535; 67 L. J. (Q.B.) 829.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

event, s. 18 of the Finance Act, 1894, does not apply, and duty is not payable upon the principal value of the property.

Sir R. B. Finlay, A.-G., in reply.

Cur. adv. vult.

April 21. The following judgment was read by

RIDLEY J. In this case a question of importance arises under the Succession Duty Act, 1853, in the following circumstances. By a settlement dated April 19, 1817, large estates in Northumberland were limited to certain uses, and in 1867 (in the events which had happened) they stood limited to the use of the sixth Duke of Northumberland for life, with remainder to his eldest son in tail male. In 1868 disentailing deeds were executed giving a joint power of appointment to the sixth Duke and his eldest son, Earl Percy, now seventh Duke; and on December 1, 1870, under that power of appointment a parcel of land, which was part of the estates so brought into settlement, was conveyed to Lord James Murray in fee. In 1874 Lord James Murray died, having devised his estates to his wife, and in 1888 the widow died, having devised them to her daughter, Miss Murray, one of the defendants. She paid succession duty under 16 & 17 Vict. c. 51, s. 10, and 51 & 52 Vict. c. 8, s. 21, at the rate of 1½ per cent. on the value of the interest derived from her mother (considered as an annuity) in the real estate so devised to her, including this particular parcel of land. On January 2, 1899, the sixth Duke of Northumberland died, and it was now contended that succession duty became payable on his death in respect of this piece of land, under the same statutes, at the rate of 6½ per cent. But it was not contended by the Attorney-General, having regard to the date of the sale to Lord James Murray, that s. 18 of the Finance Act, 1894, applied, and, therefore, it was asked that the percentage should be calculated on the value of the interest considered as an annuity under s. 21 of the Succession Duty Act, 1853.

For the Crown it was contended that, on a disposition of property being made, no title to the property can be free of the duty, though such duty is only payable on the succession

coming into possession; that, if Lord James Murray had outlived the sixth Duke, it was not denied that duty would have been payable; that this particular case cannot be distinguished, and is within the words of s. 15 of the Succession Duty Act, 1853, by which it is enacted that in the case of alienation the duty payable in respect of a succession shall be paid at the same rate and time as the same would have been payable if no such alienation had been made; and, lastly, that, if that were not so, then by the last sentence of s. 15 the duty becomes payable, the succession having been accelerated by the extinction of a prior interest. For the defendants it was contended, on the other hand, that no duty was payable except that paid by Miss Murray on the new devolution; that the original succession was dead by reason of the disentailing deeds of 1868; that, if not, no succession in real property can be subject to double duty; and that s. 15 did not apply to this case, because here was a "title conferring a new succession"—that is to say, the title derived from Lord or Lady James Murray, which conferred a succession on their daughter.

As the main point in the case turns on the proper construction of the latter part of s. 15 of the Act, it is desirable to set out the words of that portion of the section, which are as follows: "And where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place." It must be admitted, as indeed it was admitted by Mr. Haldane, that, subject to the effect of alienation and the special provisions of the statute, property

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

Ridley J.

which has once been disposed of so as to become a succession continues to be such, and that the duty having once attached continues to attach, though not payable until the succession comes into possession. But the question here is—admitting that principle, Does the statute in this case, where there has been an alienation and a disposition by the alienee, leave the duty still payable? Or is the property, freed from the former succession, left in the hands of the purchaser's representatives subject only to the duty which attaches to the succession which devolves on them from him?

The section in question has been the subject of judicial consideration more than once. In *Solicitor-General* v. *Law Reversionary Interest Society* (1) T. was life tenant of land, and W. tenant in fee in remainder. W. sold his interest to the defendant society, and died. On T.'s death the defendants entered into possession, and it was held that they must pay duty, and, being a corporation, on the principal value of the property (s. 27 of the Act). The judgment was delivered by Cleasby B. He says (2): "The succession (created by s. 2) being property liable to duty, the charge imposed is not upon the person (until it becomes payable), but upon the property, and must go with it unless there is something in the Act to remove it, which there is not. . . ." Again, "the second part of s. 15 provides for the mode of paying the succession duty in the case of alienation. It assumes, therefore, that the charge continues." The Court decided that, though the remainderman had died before the tenant for life, the duty was payable as if the remainderman had succeeded. That case is of importance upon the general scope and scheme of the Act, but it only indirectly bears on the question now before the Court; and indeed Mr. Haldane was able to accept the judgment except so far as it deals with the rate at which duty was decided to be payable.

In re Cooper and Allen to *Harlech* (3) is the next decision to which reference must be made. That was a case between vendor and purchaser, and, the question being whether a good

(1) L. R. 8 Ex. 233. (2) L. R. 8 Ex. at p. 238.
(3) 4 Ch. D. 802.

title had been made, one of the objections taken was that it was bad because the purchaser was liable to succession duty. The facts were that A., tenant for life, and B., tenant in tail in remainder, sold land to C., and C. devised to D. for life with remainder over. D. entered into possession, and paid duty on his succession, and it was decided by the Master of the Rolls, Sir George Jessel, that as "a new succession" had been created by C., duty became payable on that succession, but on that succession only. It is true that in that case the Crown was not represented, and that the point arose for decision, not on a demand for duty, but incidentally in another matter. Yet the facts seem to me undistinguishable from those now before the Court, and, if the point had not been again raised and discussed in a later case, to which reference must shortly be made, it would hardly have been possible to treat the decision otherwise than authoritative as in favour of the defendants. The Master of the Rolls agreed that there was no reason why a purchaser should not be as immediately within s. 2 as the original successor (1); but he considered that the point before him was concluded by this portion of s. 15. In construing that, he held that the words "not conferring a new succession" go with "alienation" as well as with the words "any title," so that to bring any case within that section the alienation must not confer a new succession; whereas in the case before him there had been an alienation to C., and then by C.'s will a new succession conferred on D. by title from him. If, he says, the purchaser C. had not died, the result would have been that the duty payable by B. on A.'s death would have become payable by C. on A.'s death. But C. dies, and there is then a title conferring a new succession. Then, he continues, he is to pay duty on that succession, but only on one. "The Government has by the merger got the benefit of reducing the estate once more to the fee simple on which there is a succession, and the successor coming in pays the duty. Why is it to get a second duty?" According to this view, no duty would be payable in the present case beyond that paid on the new succession, there having

(1) 4 Ch. D. at p. 824.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

Ridley J.

been "a title conferring a new succession" within the meaning of the 15th section.

But in 1898 the case of *Wolverton* v. *Attorney-General* (1) was decided in the House of Lords. In that case Lord Wolverton had bequeathed his residuary personal estate in trust for his wife for life, and after her death in trust for the person who should then be his right heir. After his death five nieces became his co-heiresses, and his nephew, the appellant, succeeded to the title. A deed of arrangement was executed by which the widow assigned her interest in bank shares (which were part of the residuary estate), and the co-heiresses and the appellant assigned their contingent reversionary interests in the residue to trustees, in trust to pay out of the income of the bank shares an annuity of 15,000*l.* to the appellant, and other annuities to the co-heiresses; and after the death of the widow to pay out of the income of the whole residue an annuity of 15,000*l.* to the person for the time being holding the title, with other payments to the co-heiresses. The widow died, and the co-heiresses paid legacy duty at 3 per cent. on the whole residue. The House of Lords held that the deed did not create "a new succession," on this point reversing the decision of the Court of Appeal; and that the case was one of alienation of part of the succession created by the testator's will, and fell under that part of s. 15 quoted above, but that no duty was payable owing to the operation of s. 18. The facts there were different from those in the case of *In re Cooper and Allen* to *Harlech*. (2) That was a case where A., tenant for life of realty, and B., remainderman, conveyed to C.; C. devised to D., and died before A.; held, a new succession in D. Here A. and B. conveyed to C., and A. predeceased C., while the matter in hand was personalty. The cases therefore, as was pointed out in the judgments, are clearly distinguishable. But the decision of the House of Lords in *Wolverton* v. *Attorney-General* (1) is of much importance on the point now being discussed, because of the observations made upon *In re Cooper and Allen* to *Harlech* (2), especially by Lord Herschell. In the first place, Lord

(1) [1898] A. C. 535. (2) 4 Ch. D. 802.

Herschell stated that, in his opinion, the words "not conferring a new succession" do not qualify the word "alienation" in s. 15, but are to be read as they are placed, grammatically; just the same, that is, as it would be if the section had read "by any title not conferring a new succession, or by alienation," in which collocation of the words no doubt could have arisen. If the Master of the Rolls in *In re Cooper and Allen* to *Harlech* (1) had taken that view, it is difficult to see how he could have decided as he did, though he might have argued that, though there was an alienation within the meaning of the section, yet there was also a title which did confer a new succession—that is to say, the title derived from the alienee, which was not within it. But the words of the section are "alienation *or* title," &c., and, once granted that there is either one or the other, it would seem to follow that the enactment must apply. But Lord Herschell in his judgment (2) further points out that there may be a title conferring a new succession which would not be an alienation. "A succession might, for example, before it fell into possession, have devolved by death upon another person or persons so as to create a new succession"; and he continues: "Such person or persons are termed in s. 14 'other successor or successors.' It was necessary to insert after the words 'by any title' the words 'not conferring a new succession'—otherwise there would have been a conflict as regards personalty between the 14th and 15th sections. On the other hand, a succession might by operation of law become vested in some other person, as, for example, an assignee in bankruptcy, which would be a title not creating a new succession." This reasoning is of importance, because it seems to shew that Lord Herschell regarded the words "by any title" as referring to a title not arising by alienation, but arising from some devolution occurring before the succession created by the original disposition comes into possession. I do not think that the language of Lord Macnaghten (3) can be held to mean anything to the contrary of this, for the rest of his

(1) 4 Ch. D. 802. (2) [1898] A. C. at pp. 554, 555.
(3) [1898] A. C. at p. 561.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

Ridley J.

judgment is opposed to such a meaning. "A new succession may of course be conferred," he says, "by a title in which alienation is followed by a transmission of interest before the succession vests in possession." But he does not say that would be the case of a title conferring a new succession within s. 15.

It was further argued by Mr. Haldane that, as there was in fact a new succession now in possession, only one duty could be payable, and that duty the duty payable by virtue of the new devolution. There could in fact be only one possession, and the possession of the subsequent succession prevented the former liability from ever attaching. In support of this view a passage on p. 635 of Hanson on Succession Duty, 4th ed., was quoted. But I think that passage does not deal with alienation at all. Sect. 6 (at p. 632) deals with that; while this passage occurs in s. 7, which deals with "titles not conferring a new succession." But I cannot reconcile this argument with another portion of the judgment of Lord Herschell (1), in which he disposes of what appears to me to be precisely the same reasoning used by the Master of the Rolls in *In re Cooper and Allen* to *Harlech*. (2) Lord Herschell had not, indeed, at that moment to deal with a case in which a new succession had been derived from the alienee, but he uses language from which it seems to me to follow that upon such facts the true view is that C. during A.'s lifetime is in possession of A.'s life estate, and on his decease D. becomes possessed of the same, upon which duty is payable. On A.'s decease the original succession in B., till then in remainder, becomes an interest in possession, and duty is payable on that also.

It was urged that the Legislature could not have intended that there should be two successions on which duty is to be payable in one property; and that argument would have some weight but for the observation of the Attorney-General that, the liability created by the statute being well known, it is provided for on alienation by arrangement between vendor and purchaser. And it further appears to me that, if the word "alienation" be read as, according to *Wolverton* v. *Attorney-*

(1) [1898] A. C. at pp. 552, 553. (2) 4 Ch. D. 802.

General (1), it is to be read, it follows that the Legislature did contemplate such an eventuality. Given that, according to the principle of the Act, property which has once been disposed of so as to confer a succession continues liable to the duty, it is in accordance with such principle that a mere alienation should not put an end to that liability, even if the words of the 15th section did not so provide. Then, when the alienee so disposes of the property as to confer a succession, that is a new succession which brings its own liability to duty under the principal section of the Act.

It was, however, contended further by Mr. Danckwerts that by virtue of the disentailing deeds of 1868 giving a joint power of appointment to the sixth and seventh Dukes the original succession had been brought to an end by virtue of the overriding force of the statute for the abolition of fines and recoveries. For this, however, there is, in my opinion, no authority. That Act has simply the effect of doing away with the ancient procedure and substituting a simple method of getting in the fee simple. If, indeed, it had the effect contended for, then there would be but one duty payable under the present circumstances; but, as I have said, I think there is no authority for this contention.

Upon the whole, I think that, though it cannot be said that *In re Cooper and Allen* to *Harlech* (2) was overruled by the House of Lords in *Wolverton* v. *Attorney-General* (1), yet that it was (in the language of the *Law Journal* reporter) disapproved of. Though the facts are distinguishable, what seems to me to have been the main argument which obtained the assent, and guided the decision, of the Master of the Rolls in the former case was rejected by the House of Lords in the latter. Upon the same state of facts as those before the Master of the Rolls, I can hardly doubt that the latter tribunal would have arrived at a different decision. And I think, such being the state of the authorities, that I ought to follow the reasoning of the higher tribunal, more particularly as my own opinion of the meaning of the section is in accordance with it rather than with that of Sir George Jessel.

(1) [1893] A. C. 535; 67 L. J. (Q.B.) 829. (2) 4 Ch. D. 802.

1903

ATTORNEY-GENERAL v. NORTHUMBERLAND (DUKE OF).

Ridley J.

Taking the view which I do, it is not necessary to discuss the final clause of s. 15. But I should add that the note on p. 706 of Hanson on Succession Duty, 4th ed., is, if my view is correct, erroneous.

I think that the Duke of Northumberland, being the successor within ss. 42 and 44, is liable to duty, and there must be judgment for the Crown against him and Miss Murray at 6½ per cent. on the value of the succession considered as an annuity. As against the defendant Bell, I understand the Attorney-General not to ask for judgment.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of the Treasury.*
Solicitors for defendants: *Bell, Steward, May & How.*

W. J. B.

1903
May 13.

ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK COMPANY.

Revenue—Stamp Duty—Company—Consolidation of Debenture Stock—Issue of Loan Capital—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

By the special Act of the defendant company, three different debenture stocks of the company, being respectively 3 per cent., 4 per cent., and 4¼ per cent. stock, and amounting to 411,852*l.*, were extinguished, and in lieu thereof there was created a new 3 per cent. debenture stock. The holders of the original 3 per cent. stock received the same nominal amount of the new stock, and the holders of the 4 per cent. and 4¼ per cent. stocks received new stock to such nominal amount as at the rate of 3 per cent. would yield to the holder the same amount as was payable in respect of the stock previously held. The amount of the new debenture stock requisite to carry out the Act was 529,136*l.*, and stock to this amount was inscribed in the names of the persons entitled thereto, and certificates were issued in exchange for the old certificates:—

Held, that the company had not proposed to "issue any loan capital" within the meaning of s. 8 of the Finance Act, 1899, and that the stamp duty imposed by that section was not payable.

SPECIAL CASE stated by consent pursuant to Order LXVIII., r. 2, and Order XXXIV., r. 1, in an action by the Attorney-General,

as informant, claiming duty and penalties under s. 8 of the Finance Act, 1899. (1)

The defendants were a company formed and established in the United Kingdom within the meaning of the above-named section, having been incorporated by the Regent's Canal City and Docks Railway Act, 1882.

By the Regent's Canal City and Docks Railway Act, 1892, the name of the defendants was changed to that of the North Metropolitan Railway and Canal Company, and by the Regent's Canal and Docks Act, 1900, their name was changed to that of the Regent's Canal and Dock Company.

Between the years 1882 and 1900 (both inclusive) the defendants from time to time, under the said Act of 1882 and other Acts in that behalf empowering them, issued, and there was existing at the date of the passing of the Regent's Canal and Dock Act, 1900, debenture stock to the amount and at the rates of interest following:—

At 3 per cent.	At 4 per cent.	At 4½ per cent.	Total Debenture Stock.
£ 110,000	£ 101,852	£ 200,000	£ 411,852

All the said debenture stock was perpetual.

By the Regent's Canal and Dock Act, 1900, after reciting that it was expedient that the debenture stock issued by the company should be consolidated into a single debenture stock bearing a uniform rate of dividend of 3 per cent., it was provided (inter alia) as follows:—

Sect. 2: "Part 3 (relating to debenture stock) and part 4

(1) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8: "(1.) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall before the issue thereof deliver to the Commissioners a statement of the amount proposed to be secured by the issue.

"(2.) Subject to the provisions of this section, every such statement shall be charged with an ad valorem stamp duty of two shillings and sixpence for every hundred pounds and any fraction of a hundred pounds over any multiple of a hundred pounds of the amount proposed to be secured by the issue, and the amount of the duty shall be a debt due to Her Majesty."

1903

ATTORNEY-GENERAL v. REGENT'S CANAL AND DOCK COMPANY.

(relating to change of name) of the Companies Clauses Act, 1863, are, except where expressly varied by this Act, incorporated with and form part of this Act.

"The new debenture stock by this Act created shall be deemed to be debenture stock created by the company within the meaning of and in accordance with the provisions of part 3 of the Companies Clauses Act, 1863."

Sect. 3: "(1.) On the thirty-first day of December, one thousand nine hundred, the following stocks of the company shall be by this Act cancelled and extinguished (that is to say):

"The three per centum debenture stock, the four per centum debenture stock, the four and a quarter per centum debenture stock.

"(2.) On the said thirty-first day of December, one thousand nine hundred, there shall be by virtue of this Act without further or other authority created in lieu of the stocks extinguished by this Act debenture stock of the company (hereinafter referred to as new debenture stock) of such nominal amount as may be necessary for giving effect to the provisions of this section.

"(3.) Every holder of any of the stocks by this Act extinguished shall be entitled to and shall receive in substitution for every one hundred pounds of such stock held by him and so in proportion for every fraction of one hundred pounds new debenture stock as follows (that is to say):

"In the case of holders of existing three per centum debenture stock the same nominal amount of new debenture stock. In the case of holders of existing four per centum debenture stock and of four and a quarter per centum debenture stock respectively, new debenture stock to such nominal amount as at the rate of three per centum will yield to the holder in cash the same amount as the amount of the interest now payable in respect of the existing debenture stock held by him.

"(4.) The new debenture stock shall bear the dividend of three per centum per annum."

Sect. 4: "Notwithstanding anything in this Act contained, no person shall become entitled under this Act to any fraction

of the new debenture stock of the company being less than one pound, but in every case in which any such person would but for this enactment have become entitled to a fraction of such stock the company may at their option pay to such person such a further sum in cash calculated at the then market price of the new debenture stock as will represent the amount of such fraction of stock, and thereupon a portion equivalent in nominal amount to such portion of stock shall be by this Act extinguished."

Sect. 5: "The stock by this Act substituted for any existing stock shall be held in the same rights, on the same trusts, and subject to the same powers, provisions, charges, and liabilities as those on or to which such existing stock was held immediately before the substitution."

The Act received the Royal assent on July 30, 1900.

The defendants exercised the option reserved to them by s. 4 of the said Act to pay the market price in lieu of fraction of stock, but the total amount paid by them in this respect was under 20*s*.

The amount of new debenture stock which was required to carry out the provisions of the said Act was 529,136*l*., and debenture stock to this amount was inscribed in the names of the persons entitled thereto under the said Act on or soon after January 1, 1901, and certificates in respect of the same were from time to time given in exchange for the old certificates as and when applied for after January 1, 1901.

The questions for the opinion of the Court were:—

1. Whether the defendants have under the said Act proposed to issue, or issued, any loan capital, and, if so, to what amount?

2. Whether a statement of the whole or any part of the new debenture stock was deliverable by the defendants to the Commissioners of Inland Revenue under s. 8, sub-s. 1, of the Finance Act, 1899, and, if so, of what amount?

3. Whether the defendants were liable to pay to His Majesty the sum claimed, or any and what part thereof?

If the Court should be of opinion in the affirmative of the said questions, then judgment was to be entered for the informant for such sum as the Court might direct with costs. If the

1903

ATTORNEY-GENERAL v. REGENT'S CANAL AND DOCK COMPANY.

Court should be of opinion in the negative, judgment was to be entered for the defendants with costs.

Rowlatt (*Sir E. H. Carson, S.-G.*, with him), for the informant. The facts stated in the case bring it within s. 8 of the Finance Act, 1899. The defendants have "proposed to issue" loan capital, and have issued it. The machinery of an "issue" of debenture stock, as regulated by ss. 28 and 29 of the Companies Clauses Act, 1863, comprises the creation of the stock, the entering in the register of the names and addresses of the holders and the amounts to which they are entitled, and the delivery to each holder of a certificate. That has been done in this case, and every requirement of an "issue" has therefore been fulfilled.

Danckwerts, K.C., and *Loehnis*, for the defendants, were not called upon to argue.

RIDLEY J. I am of opinion that what has happened in the case of this company does not constitute an issue of loan capital within the meaning of s. 8 of the Finance Act, 1899. It is contended on behalf of the Crown that the word "issue" as used in that section is a word of a technical nature, and that in the circumstances of this case there has been an issue of loan capital in that sense. If that were so, it would follow that stamp duty was payable. It appears to me that in order to determine whether there has been an issue or not one must refer to the private Act of Parliament relating to this matter, and I think that that Act shews that the matter was not dealt with as an issue of new capital. If the language of s. 8 of the Finance Act, 1899, had been similar to that of s. 113 of the Stamp Act, 1891, upon which *Attorney-General* v. *Midland Ry. Co.* (1) was decided, it might have been different. It was held in that case that there had been an increase of the amount of the nominal share capital by reason of a change of the stock from one percentage to another, although there was no increase in the dividend payable thereon. But the question in this case is not whether there has been an increase of the

(1) [1902] A. C. 171.

nominal share capital of the company, but whether there has been an issue of loan capital. The private Act of this company recites that it is expedient that the debenture stock so created and issued (that is, the former debenture stock created and issued) should be consolidated. Thereupon, having made that recital, there is an enactment that upon a certain day every holder of the stocks extinguished by the Act shall be entitled to and shall receive in substitution for every 100*l.* of such stock held by him, and so in proportion for every fraction of 100*l.* new debenture stock in the particular proportions, which can be calculated, and it simply requires an accountant to carry out the result and shew how much each holder of stock is to receive. It does not seem to me to be necessary to hold that that is an issue of stock; and, bearing in mind that no fresh capital is raised, I think it rather lies on the Crown to shew that it must be held that there is an issue in the technical sense of the word. I think it is quite a reasonable construction of those words to say there was not an issue within the meaning of the Finance Act, but merely a consolidation of stock previously existing into stock of another description. For this reason I do not think that duty is payable. There will be judgment for the defendants with costs.

Judgment for defendants.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

F. O. R.

1903
May 11.

HARSE *v.* PEARL LIFE ASSURANCE COMPANY.

Contract—Illegality—Wagering Policy—Insurable Interest—Action to recover Premiums paid.

The fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by the plaintiff upon the life of his mother would be a good and valid insurance, and the plaintiff, relying upon that representation, effected an insurance with the defendants on his mother's life, and paid premiums thereunder. The policy being illegal and void for want of an insurable interest:—

Held, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not in pari delicto, and the premiums could consequently be recovered back.

Appeal from the Oxford County Court.

In April, 1889, a proposal was made to the plaintiff by an agent of the defendant insurance company that he should effect an insurance with the defendants upon the life of a relative. The plaintiff agreed to insure the life of his mother, who was residing with him as his housekeeper. In the proposal form the pecuniary interest in the life insured was stated to be, "Son for funeral expenses." The plaintiff's father was alive, but he was paralyzed and unable to earn any money, and would not be in a position, in the event of his wife predeceasing him, to pay for her funeral expenses. Subsequently the plaintiff was induced by the defendants' agent to effect a second policy with the defendants upon his mother's life. The proposal form of that policy was signed by the mother herself, but the policy was effected for the benefit of the plaintiff, and the premiums were paid by him. The plaintiff was induced to take out both policies on the direct assurance of the defendants' agent that the policies would be valid.

In 1902 the plaintiff, being informed that the policies were void for want of insurable interest, brought the action in the Oxford County Court to recover the premiums paid by him

under the two policies during the preceding twelve years, amounting to 43*l.* 8*s.* At the trial the judge left the following amongst other questions to the jury so far as it was a question of fact for them: "(1.) Had the person for whose benefit the assurance was really made a real pecuniary interest under either policy? Answer: Yes." The jury also found, in the case of both policies, that the agent represented that the policy would be valid; that it was taken out by the plaintiff in consequence of what the agent said; and that the agent did not know that what he was saying was untrue. The county court judge held as matter of law that under the circumstances the fact that the plaintiff would morally be bound to pay for his mother's funeral expenses, failing the ability of his father to pay for them, gave rise to a sufficient pecuniary interest to satisfy the Life Assurance Act, 1774 (14 Geo. 3, c. 48); that the first policy was consequently good, and the premiums paid under it consequently could not be recovered back. He also held with regard to both policies that, even if they were void for want of insurable interest, the premiums could not be recovered back, for the parties were in pari delicto, the representation of the agent as to the validity of the policies having been innocently made. He accordingly gave judgment for the defendants. The plaintiff appealed.

M. Shearman, *K.C.*, and *C. Walsh*, for the plaintiff. The plaintiff had no insurable interest under either policy. With respect to the first policy, the fact that the plaintiff might at some future date feel himself under a moral obligation to pay for his mother's funeral is not enough. To found an insurable interest there must be a legal liability to pay. As to the second policy, it was in reality the plaintiff's policy, and a son as such has no insurable interest in his mother's life. Then, both policies being void, the premiums can be recovered back unless the parties were in pari delicto: *Smith* v. *Cuff*. (1) But their respective shares in the illegality of the transaction were not equal, for the plaintiff only insured because he relied upon the representation of the defendants' agent that the

(1) (1817) 6 M. & S. 160; 18 R. R. 340.

1903

HARSE v. PEARL LIFE ASSURANCE COMPANY.

policies would be valid. It is immaterial that the agent's conduct was not fraudulent. Having regard to his position, the agent ought to have known that his statement was untrue. The case is on all fours with *British Workman's and General Assurance Co.* v. *Cunliffe*. (1) There the Divisional Court held that as the representation, though an innocent one, was made by a man skilled in insurance matters to a person ignorant of the law, the premium could be recovered back.

[They also referred to *Howard* v. *Refuge Friendly Society*. (2)]

S. T. Evans, K.C., and *Parfitt*, for the defendants. As to the first policy, the plaintiff had a sufficient insurable interest. It was not essential that he should be under any legal obligation to pay for the funeral expenses. In *Barnes* v. *London, Edinburgh and Glasgow Assurance Co.* (3), where the plaintiff, who had effected a policy on the life of a young girl, her half-sister, on the death of the girl brought an action on the policy, one of the defences was want of insurable interest. The county court judge held that the plaintiff had an insurable interest in the girl's life, as there was a reasonable probability that there would be nobody to undertake her burial in the case of her death except the plaintiff, and she as her sister might feel called upon by natural affection to perform the office and spend the money on it. And the Divisional Court affirmed the judge's decision. If a father makes a voluntary allowance to his son, as the son might be a loser by his father's death, surely he may, in order to provide against that loss, insure the father's life. But if one may insure against the loss of money which one has no legal right to receive, surely one may equally insure against a loss arising from being practically compelled to pay money which one is under no legal obligation to pay.

Secondly, assuming both policies to be void, the premiums cannot be recovered back. The position of both parties as regards the illegality is equal. An honest mistake on the part of the agent cannot be regarded as a delictum. He was not even guilty of any negligence, for he only interpreted the law as laid down in *Barnes' Case* (3) as any ordinary reader would

(1) (1902) 18 Times L. R. 425, 502.

(2) (1886) 54 L. T. (N.S.) 644.

(3) (1891) 8 Times L. R. 143.

interpret it. *British Workman's and General Assurance Co.* v. *Cunliffe* (1) is not an authority against the defendants, for there the agent, as appears from the report of that case in the Court of Appeal (2), knew that his statement was untrue, and was guilty of fraud in making it. The dictum of the Divisional Court, that an innocent misrepresentation by the insurance company's agent would suffice to prevent the parties from being in pari delicto, was obiter only.

Shearman, K.C., in reply. The report of *Barnes* v. *London, Edinburgh and Glasgow Assurance Co.* (3) in the *Law Reports* (4) shews that the Court did not proceed upon the ground that a moral obligation to pay for funeral expenses would suffice to create an insurable interest. There it appeared that the plaintiff had promised the child's mother to maintain it, and the Court held that to the extent of any sum actually expended on the child's maintenance the plaintiff would have an insurable interest in its life, upon the ground that if the child lived it might repay the money so expended on its behalf.

LORD ALVERSTONE C.J. This case is not without difficulty, but I am of opinion that our judgment must be for the appellant. In form there is a difference between the two policies. The second policy was upon the face of it perfectly in order, for it purported to be taken out by the mother upon her own life. But I think that, having regard to the finding of the jury, the second policy, like the first, was in substance and in fact taken out by the son for his benefit. The jury, in answering the question put to them as to whether the person for whose benefit the assurance was really made had a real pecuniary interest under either policy, drew no distinction between the two policies. They must, therefore, so far as the person by whom they were taken out is concerned, be treated as standing on the same footing. In that state of things two questions arise: first, whether the plaintiff by whom the policies were taken out had any insurable interest in the life

(1) 18 Times L. R. 425, 502.
(2) 18 Times L. R. 502.
(3) 8 Times L. R. 143.
(4) [1892] 1 Q. B. 864.

1903

HARSE v. PEARL LIFE ASSURANCE COMPANY.

Lord Alverstone C.J.

insured; and, secondly, whether, assuming that he had not, he can recover back the premiums that he paid, the policies being void. Upon the first point Mr. Evans contended that the plaintiff had an insurable interest in his mother's life, upon the ground that on her death the expenses of her burial would fall upon him, though not indeed as the result of any legal obligation. He argued that a moral obligation to incur the expense of the burial was sufficient to create an insurable interest, and for that proposition he relied on the case of *Barnes* v. *London, Edinburgh and Glasgow Assurance Co.* (1) No doubt the report of that case in the *Times Law Reports* (1) does give some countenance to that contention; but the report of the case in the *Law Reports* (2) says nothing whatever about an insurable interest in the child's life arising out of a moral obligation on the plaintiff to pay for its funeral expenses. So far as appears from the *Law Reports*, the Court proceeded upon the ground that the plaintiff, having given a promise to the child's mother to look after the child and help to maintain it, and having in discharge of that promise expended money in maintaining the child, and having a reasonable expectation that the child if it lived would repay the money so expended on its behalf, had an insurable interest in the child's life up to the amount of the payments actually made on its account, analogous to that which a creditor has in the life of his debtor. That is, I think, all that the Court intended to decide in that case. If they meant to go further and hold that an expectation of having some day to pay the funeral expenses of a person whom the plaintiff is under no legal obligation to bury is sufficient to create an insurable interest, I do not think the decision could be supported. In the present case I come to the conclusion that the plaintiff had no insurable interest in his mother's life, and that the policies are consequently void. Then is the plaintiff entitled to recover back the premiums paid? That depends upon whether the parties can be said to be in pari delicto or not. Now the jury have found that the

(1) 8 Times L. R. 143. (2) [1892] 1 Q. B. 864.

1903

HARSE v. PEARL LIFE ASSURANCE COMPANY.

Lord Alverstone C.J.

defendants' agent represented to the plaintiff that both the policies were good and valid policies, and that it was in consequence of and in reliance upon that representation that the plaintiff took the policies out. But they also found that in making the representation which he did the agent was not guilty of any fraud—that is to say, that he made it in good faith believing it to be true. Does the fact that the defendants' agent innocently induced the plaintiff to enter into the illegal contract make the latter's share in the illegality the lesser of the two? I think it does. The case seems to me to come within the principle of the decision of the Divisional Court in *British Workman's and General Assurance Co.* v. *Cunliffe.* (1) I there said that "The case fell within the cases cited where a contract had been entered into through an innocent misrepresentation, and the persons on whose behalf it was made were not entitled to retain the money. There was a good deal more than misrepresentation of law, as the matter might depend on the particular regulations of the company. It came near the cases where there was a misrepresentation, not as to the general law, but as to the particular obligations which the company had entered into." And Channell J. said: "The rule"—that money paid under a mistake of law cannot be recovered back—"only applied to ignorance of a general rule of law; and when it was clear that the mistake was occasioned by a misrepresentation by one party to the other, and it was proved that one party was ignorant of the law, and the other party who made the representation was not, and that the circumstances were such that the one party would rely on the knowledge of the other, then if a party paid money over it could not be retained by the party who had made the misrepresentation." It seems to me that the parties in the present case were not in pari delicto. The defendants' agent is a person who ought to be presumed to have a peculiar knowledge of the particular branch of law relating to insurance; he pressed the plaintiff to insure the life of his relative, and represented to him that such an insurance could be legally effected. Under the circumstances it was reasonable

(1) 18 Times L. R. 425.

1903

HARSE v. PEARL LIFE ASSURANCE COMPANY.

Lord Alverstone C.J.

that the plaintiff should rely upon that representation. It is true that in the *British Workman's Case* (1) the Court of Appeal, in affirming the Divisional Court, proceeded upon the assumption that the insurance company's agent knew that the party effecting the policy had no insurable interest in the life insured; but I do not think that they intended to negative the wider proposition which we laid down in the Divisional Court, and that proposition exactly covers the present case.

WILLS J. I am of the same opinion.

CHANNELL J. The question whether under the circumstances of this case the premiums can be recovered back is an important and difficult one. If these contracts of insurance were merely void, there would be no difficulty whatever; the premiums, being paid without consideration, could clearly be recovered back. But the contracts, being contrary to the statute, are not merely void, but illegal. Then does that fact that they are illegal as well as void prevent the premiums from being recovered? That depends upon the applicability of the maxim, "In pari delicto potior est conditio defendentis." Can a man who has entered into a contract which is illegal excuse himself within the meaning of that maxim by saying that he did not know it was illegal? No doubt it is commonly said that every man is presumed to know the law. But there is ample authority for saying that that proposition is by no means universally true. It seems to me that in the case before the Court the plaintiff is entitled to plead his ignorance of the law. If a man who has no knowledge of insurance law is asked by an agent of the insurance company, who probably does know and certainly ought to know the general principles of the law relating to his business, to insure the life of another person, and in answer to an inquiry as to whether the insurance will be legal and valid is told by the agent that it will, then if he is fraudulently told so, and if the agent knows that the insurance will not be legal, it is quite clear that the premiums can

(1) 18 Times L. R. 502.

be recovered back. The decision of the Court of Appeal in *British Workman's and General Assurance Co.* v. *Cunliffe* (1) is a direct authority for that. And in the Court below we held, and I am prepared to hold now, that fraud is not essential, and that, as between parties situated as are the parties before the Court, where the contract has been procured by a statement which though innocent is not true, the money can equally be recovered back, unless there was some conduct on the part of the plaintiff so wrong that he cannot be heard to set up the illegality of his contract. I can see nothing that has happened in the present case to disentitle the plaintiff from recovering. If indeed the life had fallen in, the matter might have been otherwise; but that question does not arise here.

Judgment for plaintiff. Leave to appeal.

Solicitors for plaintiff: *Esson & Mallam, for G. Mallam & Sons, Oxford.*

Solicitors for defendants: *Storer, for Hatt, Oxford.*

(1) 18 Times L. R. 502.

J. F. C.

C. A.

1903

April 29, 30; *May* 11.

[IN THE COURT OF APPEAL.]

McQUIRE *v.* WESTERN MORNING NEWS COMPANY, LIMITED.

Defamation (Libel)—Fair Comment—Literary Work—Honest Criticism—Withdrawal of Case from Jury.

A "fair comment" upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion, and does not go beyond the limits of what may fairly be called criticism, is no libel, even although the comment be not such as a jury might think to be a just or reasonable appreciation of the work criticized.

If in an action of libel there is no evidence of anything beyond such a comment as above mentioned, there is no case for the jury.

APPLICATION by the defendants for judgment or a new trial in an action for libel tried before Ridley J. and a jury.

The statement of claim stated that the plaintiff was an actor and theatrical manager, and the defendants were the owners of a newspaper called the *Western Morning News*; that on June 24, 1901, the plaintiff and a travelling company under his management appeared at the Theatre Royal, Plymouth, in a musical play written and composed by the plaintiff, entitled "The Major"; that, in the edition of the defendants' newspaper dated June 25, 1901, the defendants falsely and maliciously caused to be printed and published of and concerning the plaintiff, and of him as such actor and manager, and also as such author and composer as aforesaid, the words following: "A three act musical absurdity entitled 'The Major,' written and composed by Mr. T. C. McQuire, was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, 'The Major' is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial

plot, and were a good deal of the sorry stuff taken out of it which lowers both the players and the play. No doubt the actors and actresses are well suited to the piece, which gives excellent scope for music-hall artistes to display their talent. Among Mr. McQuire's company there is not one good actor or actress, and, with the exception of Mr. Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar, songs does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness"; and that by the said words the defendants meant, and were understood to mean, and the meaning of the said words was, that the said play was dull, vulgar, and degrading, that the members of the plaintiff's company were incompetent as actors, singers, and dancers, that they were music-hall artistes, and that the plaintiff was himself incompetent both as an actor and composer as aforesaid.

The defence admitted the publication by the defendants of the matter complained of, but pleaded that it was published by them in the ordinary course of their business as public journalists, and without any malice to the plaintiff, and that it was a fair and bonâ fide criticism upon the play referred to in the statement of claim and its performance, which were matters of public interest, and was therefore no libel.

Evidence was given at the trial on both sides with regard to the nature of the play in question and its performance. With regard to the effect of this evidence, it appears sufficient for the purposes of this report to refer to the concluding sentence of the judgment of the Master of the Rolls. There was no evidence of any personal malice towards the plaintiff, or of any indirect motive, on the part of the writer of the criticism or of any one responsible for the management of the defendants' newspaper. The learned judge left the question whether the criticism complained of was or was not a libel to the jury, who found a verdict for the plaintiff with 100*l.* damages.

April 29, 30. *Duke, K.C.*, and *J. A. Hawke*, for the defendants. The defendants are entitled to judgment, or at

C. A. 1903

McQUIRE v. WESTERN MORNING NEWS COMPANY.

any rate to a new trial. It has been said in cases of this kind, e.g., *Merivale* v. *Carson* (1) and *Wason* v. *Walter* (2), that what might otherwise be libellous is not so if it is "fair" comment on a matter of public interest, or "fair" criticism of a literary work or performance submitted to the public judgment. The question is, What is the meaning of the word "fair" in this connection? It is submitted that, on the true view of the authorities, it does not mean criticism which in the eyes of the jury is just or justifiable. If it did, the right of free criticism, which exists in the public interest, would practically be destroyed. The meaning is that what is published must be bonâ fide "criticism," that which may "fairly" be considered "criticism." The writer must not overstep the limits of criticism, and, under the guise of criticizing the production, make an attack on the personal character of the man whose production is discussed. If the writer does not transcend the limit of bonâ fide criticism, then, however severe, or even unjust in a sense, the criticism may be, the critic is entitled to express his honest opinion on a work submitted to the judgment of the public, and is not guilty of libel. The true legal doctrine on the subject is that expressed by Lord Ellenborough in the case of *Carr* v. *Hood* (3), reported in a note to *Tabart* v. *Tipper*. (4) He there said in summing up: "Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right." In the course of the case he said: "We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his

(1) (1887) 20 Q. B. D. 275.
(2) (1868) L. R. 4 Q. B. 73.
(3) (1808) 1 Camp. 354; 10 R. R. 701.
(4) (1808) 1 Camp. 350; 10 R. R. 698.

character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him; but I cannot hear of malice on account of turning his works into ridicule." The effect of what Lord Ellenborough said is to lay down the broad and intelligible rule that, so long as the matter published is bonâ fide comment on the work only, or the author as an author, and there is no attack on the author as a man, nor any untrue statements of fact with regard to him or his work, there is no libel. The subsequent authorities, such as *Campbell* v. *Spottiswoode* (1), are, it is submitted, really to the same effect. Though the word "fair" may have been used somewhat ambiguously in relation to this subject in some passages of judgments given in subsequent cases, and might, if these passages are isolated from the context and the facts of the case, be construed as meaning that criticism, if, in the opinion of a jury, excessive or exaggerated beyond a certain degree, may be libellous, those passages must be looked at with reference to the facts of the particular cases in which they were uttered; and it is submitted that the general effect of the authorities is that, if in such a case as this the critic does not exceed the bounds of comment or criticism, if he confines himself to the merits of the work before him and honestly states his opinion of it, there is no libel, however excessive and exaggerated the jury may think the criticism to be. From what Lord Esher M.R. said in *Merivale* v. *Carson* (2) at the end of his judgment, it may be inferred that he thought the question in such cases is whether the comment is really criticism of the work. In the same case Bowen L.J. says: "In the case of literary criticism it is not easy to conceive what would be outside that region," i.e., the reasonable limits of fair criticism, "unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticizing." It is possible that the language of some criticisms may be such, and may be published under such circumstances, as to furnish evidence that the writer was not in truth bonâ fide criticizing the work discussed, but maliciously attacking the author personally, and then a jury might find

(1) (1863) 3 B. & S. 769. (2) 20 Q. B. D. 275.

C. A. 1903

McQUIRE v. WESTERN MORNING NEWS COMPANY.

that the criticism was a libel, but it is submitted that the present is not a case of that kind.

The summing-up of the learned judge amounted to a misdirection, because it contained expressions which might lead the jury to think that, if they disagreed with the criticism published by the defendants, and, if they thought it unjust, they ought to find it to be a libel. Therefore the defendants are entitled at least to a new trial on that ground, and on the ground that the verdict was against evidence. But, further, it is submitted that the Court should enter judgment for the defendants. Some difficulty is, no doubt, created in libel cases by Fox's Act (32 Geo. 3, c. 60); but, nevertheless, in the case of actions for libel as in other actions, there is always the preliminary question whether there is any evidence of a cause of action for the jury. It has always been held, for instance, that, though the question of libel or no libel is for the jury, it is for the judge to say whether the matter complained of is capable of being a libel, and, if he thinks it is not, he may withdraw the case from the jury. The present case is, no doubt, somewhat different from those in which the question arises merely on the construction of the document alleged to be a libel; because, in order to determine whether the document complained of here is capable of being a libel, it is necessary not only to construe it, but also to ascertain the circumstances under which it was published. But it is contended that, when the whole of the evidence has been given in a case of this kind, then, if the judge is of opinion that there is no evidence of anything beyond bonâ fide criticism of a work submitted to the public judgment, he ought either to withdraw the case from the jury, or to direct them to give a verdict for the defendants. Expressions have sometimes been used importing that the doctrine with regard to fair comment is a branch of the doctrine of privileged communication; in which case it is for the judge to rule whether the occasion is privileged, and, if the judge rules that it is, and thinks there is no evidence of express malice, he may withdraw the case from the jury: *Henwood* v. *Harrison*. (1) It has been settled that this

(1) (1872) L. R. 7 C. P. 606.

mode of looking at such cases is technically erroneous, and that the defence in such cases is that the words are not really defamatory, fair criticism being no libel: see *Campbell* v. *Spottiswoode*. (1) But the distinction is really somewhat academic: see per Bowen L.J. in *Merivale* v. *Carson* (2); and the defendants cannot stand in a worse position than if the question were one of privileged communication. Assuming that, technically, the facts did raise the question whether the matter complained of was a libel or not for the jury, if the total result of the evidence was such that, however often a jury might find that there was a libel, the Court ought to set aside the verdict as against evidence, then under Order XL., r. 10, the Court ought to give judgment for the defendants.

[They also cited *Paris* v. *Levy* (3); *Macleod* v. *Wakley*. (4)]

Clavell Salter, for the plaintiff. The question in this case was eminently one for the jury, and they were entitled to decide it as they did. Taking the summing-up of the learned judge as a whole, there was no misdirection; and, even if there was, at the utmost the result can only be that there ought to be a new trial. There is, it is believed, no reported case in which the question whether a comment was fair was withdrawn from the jury. The result of the argument for the defendants is that the right of comment or criticism in such a case as this is practically unlimited, and however violent or immoderate, however unfounded and unjustifiable a comment or criticism may be, it cannot be libellous unless the character of the author, apart from his work, is attacked, or false statements of fact are made concerning him. The argument comes to this, that comment is not libel, whether fair or unfair. According to this view, there is no such thing as unfair criticism for this purpose. If the matter complained of is merely comment, it is fair comment and therefore not libel. It is submitted that the authorities do not bear out this view, which really gives the go-by to the proper meaning of the expression "fair comment," the expression which has been almost universally used in all the modern cases on the

(1) 3 B. & S. 769.
(2) 20 Q. B. D. 275, at p. 283.
(3) (1860) 9 C. B. (N.S.) 342.
(4) (1828) 3 C. & P. 311; 33 R. R. 663.

C. A. 1903

McQUIRE v. WESTERN MORNING NEWS COMPANY.

subject. In *Merivale* v. *Carson* (1) Lord Esher M.R. said: "What is the meaning of a 'fair comment'? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced, or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It would be very easy to say what would be clearly beyond that limit: if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case." It is impossible to treat this language as merely equivalent to saying that the question is whether the article goes beyond what may fairly be considered comment. Bowen L.J. said in *Merivale* v. *Carson* (2) that the proper mode of directing the jury in cases of this kind is "to begin by asking them whether they think the limits of fair criticism have been passed." He goes on to say: "That implies that there is no libel, if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell* v. *Spottiswoode* (3) (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of 'fair criticism'? The criticism is to be 'fair,' that is the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls 'fair'; and, although we cannot find in any decided case an exact and rigid definition of the word 'fair,' this is because the judges have always preferred to leave the question what is 'fair' to the jury. The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden C.J.

(1) 20 Q. B. D. 275, at p. 280. (2) 20 Q. B. D. 275, at p. 283.
(3) 3 B. & S. 769.

in *Macleod* v. *Wakley* (1), where he said: 'Whatever is fair, and can be reasonably said of the works of authors, or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticizing the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism." It is submitted that what Bowen L.J. there said is wholly inconsistent with the construction which the defendants' counsel seek to put on the word "fair" in this connection. If that construction be right, then the mode in which Bowen L.J. says the question is always left to the jury in such cases, and in which Ridley J. substantially left it to them in this case, would be most misleading. What the Lord Justice says, and the passage quoted from Lord Tenterden's judgment, both involve that the question is whether the mode of expression is so wrong, exaggerated, or violent as to exceed the reasonable limits of fair criticism. The judgment of Cockburn C.J. in *Wason* v. *Walter* (2) is to the same effect. After stating that the Court are of opinion that the direction given to the jury was correct, he says: "The jury were told that they must be satisfied that the article was an honest and fair comment on the facts—in other words that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure." That passage is wholly inconsistent with

(1) 3 C. & P. 311, at p. 313; 33 R. R. 668. (2) L. R. 4 Q. B. 73, at p. 96.

C. A. 1903

McQUIRE v. WESTERN MORNING NEWS COMPANY.

the suggestion that the only question in such cases is whether the matter complained of is really criticism or goes beyond it. It is submitted that the question was one for the jury, and that there is no ground for setting aside their verdict: at any rate the Court cannot enter judgment for the defendants. The matter published was primâ facie libellous, and it was for the defendants to satisfy the jury that it was not libellous because fair criticism. [He also cited *South Hetton Coal Co.* v. *North Eastern News Association.* (1)]

Duke, K.C., for the defendants, in reply. In *South Hetton Coal Co.* v. *North Eastern News Association* (1) it would appear that the article went beyond mere comment, and contained misstatements of fact: see the judgment of Kay L.J. on p. 148 of the report in the *Law Reports.*

Cur. adv. vult.

May 11. COLLINS M.R. read the following judgment:—This is an application by the defendants for a new trial or judgment in an action for libel tried before Ridley J.

The plaintiff is an author and actor, and the action is founded upon a notice which appeared in the defendants' newspaper of a musical play written and composed by the plaintiff and produced by a company under his management at the principal theatre in Plymouth. The plaintiff himself acted a part in the play. The notice complained of was as follows: [The learned judge read the alleged libel as set out above.] It appears on the face of the statement of claim that the notice complained of was a dramatic criticism of a play publicly acted; and therefore it could not be, and was not, contended for the plaintiff that there was any libel unless the criticism exceeded the bounds of "fair comment." It was not suggested that there was any evidence of actual malice, there were no personal imputations, nor could any statement of fact be impugned. The innuendo set out in the claim does not charge any misstatement of fact, but confines itself to matters of opinion only. It is as follows: "By the said words the defendants meant, and were understood to mean, and the meaning of the

(1) [1894] 1 Q. B. 133.

said words is that the said play was dull, vulgar, and degrading, that the members of the plaintiff's company were incompetent as actors, singers, and dancers, that they were music-hall artistes, and that the plaintiff was himself incompetent both as an actor and composer as aforesaid." The plaintiff, however, contended that the notice, though comment, was not "fair comment"; and the jury apparently adopted this view, and found for the plaintiff, with 100*l.* damages. The defendants challenge the verdict on the ground of misdirection, and also as being against the weight of evidence; but they rested their case mainly on the ground that on the facts admitted and proved it was competent for the Court itself, notwithstanding the verdict of the jury, to enter judgment for the defendants.

This raises a very important question as to what are the limits of "fair comment" on a literary work, and as to what are the respective provinces of the judge and jury with respect thereto. One thing, however, is perfectly clear, and that is that the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the "fairness" of the criticism by any such standard. "Fair," therefore, in this collocation certainly does not mean that which the ordinary reasonable man, "the man on the Clapham omnibus," as Lord Bowen phrased it, the juryman common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility. In principle, therefore, there would be nothing to leave to the jury unless there was some element in the criticism which might support an inference of unfairness in some other sense. No doubt this element might be, and has been, described in various ways and different instances of it given; but, broadly, I think Mr. Duke is right in contending that, in the case of a literary work at all events, it is something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact. "If," says Lord Ellenborough in *Carr* v. *Hood* (1), reported in a note to *Tabart* v. *Tipper* (2),

(1) 1 Camp. 354; 10 R. R. 701. (2) 1 Camp. 350; 10 R. R. 698.

C. A. 1903

McQUIRE v. WESTERN MORNING NEWS COMPANY.

Collins M.R.

"the commentator does not step aside from the work or introduce fiction for the purpose of condemnation he exercises a fair and legitimate right . . . . Had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander that would have been libellous"; and, in another passage: "Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him." In *Merivale* v. *Carson* (1) Bowen L.J. says: "In the case of literary criticism it is not easy to conceive what would be outside that region"—i.e., of fair comment—"unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticizing. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism . . . . Still, there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work." I think "fair" embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism. I am aware that the word "moderate" has been used in this connection—*Wason* v. *Walter* (2)—with reference to comment on the conduct of a public man; but I think it is only used to express the idea that invective is not criticism. It certainly cannot mean moderate in the sense that that which is deemed by a jury, in the case of a literary criticism, extravagant and the outcome of prejudice on the part of an honest writer is necessarily beyond the limit of fair comment: see *Merivale* v. *Carson*. (3) No doubt in most cases of this class there are expressions in the impugned document capable of being interpreted as falling outside the limit of honest criticism, and, therefore, it is proper to leave the question to the jury, and in all cases where there may be a doubt it may be convenient to take the opinion of a jury. But

(1) 20 Q. B. D. 275, at p. 284. (2) L. R. 4 Q. B. 73, at p. 96.
(3) 20 Q. B. D. 275.

it is always for the judge to say whether the document is capable in law of being a libel. It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to shew that it is a libel—i.e., that it travels beyond the limit of fair criticism; and therefore it must be for the judge to say whether it is reasonably capable of being so interpreted. If it is not, there is no question for the jury, and it would be competent for him to give judgment for the defendant. In *Henwood* v. *Harrison* (1) the action was against the Queen's printer, who, under the direction of the Lords of the Admiralty, had printed a Blue-book containing a letter defamatory of the plaintiff and had sold copies of the same in ordinary course. The defence was that the letter was a fair comment on a matter of public importance. It was admitted that the defendant acted bonâ fide and without malice. Brett J. nonsuited the plaintiff, and the Court of Common Pleas, Grove J. dissenting, upheld the nonsuit. Willes J., who delivered the judgment of the majority, says (2): "In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded." In that case, as in this, actual malice was not suggested, but the plaintiff nevertheless insisted that there was a question for the jury, and the ground of the nonsuit, which was upheld, was that the publication was "in the nature of fair criticism of a proposal affecting a matter of great national importance." That case, therefore, in its actual decision is directly in point. The decision, so far as I know, has never been questioned, though exception has been taken to the use of the word "privilege" to describe the public right of fair comment, and some eminent judges have preferred not to use a word which, according to its technical etymology, denotes the special right of an individual, as extending to cover the common rights of the whole community at large. In *Merivale* v. *Carson* (3) Bowen L.J. treats this difference of view as one rather

(1) L. R. 7 C. P. 606. (2) L. R. 7 C. P. at p. 628.
(3) 20 Q. B. D. 275, at p. 282.

C. A. 1903

McQuire v. Western Morning News Company.

Collins M.R.

concerned with the "metaphysical exposition" of the origin of the right itself than with the limits of its exercise, and he adds: "But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one." Indeed, since the time of Lord Ellenborough, there does not seem to have been any difference as to the extent and limits of the right itself in the case of literary criticism, and it was more commonly than not treated as resting on the principle explained by Willes J. in *Henwood* v. *Harrison* (1), which was decided in 1872, after *Campbell* v. *Spottiswoode* (2), decided in 1863, until *Merivale* v. *Carson* (3), decided in 1887: see, for instance, *Wason* v. *Walter* (4), decided in 1868. It certainly does not seem that the learned judges who suggested the later exposition of the right intended in any way to abridge the right of the critic as measured by the doctrine of "privileged occasion," or to interfere with the respective provinces of judge and jury in questions of libel. I think these considerations throw some light on the genesis and meaning of the word "fair" in the expression "fair comment," which is not of merely recent origin and co-existed with the view that the doctrine of "privileged occasion" applied to such cases. The comment, in order to be within the protection of the privilege, had to be fair—i.e., not such as to disclose in itself actual malice. It also had to be relevant; otherwise it never was within it, and the judge could hold as a matter of law that the privilege did not extend to it: *Huntley* v. *Ward* (5); *Warren* v. *Warren* (6); and in such case the only defence was truth. These factors were, I think, intended to be covered compendiously by the epithet "fair." In other words, it was intended to exclude those elements which took the comment out of, or prevented it from falling within, the privilege of the occasion. The result is that the question of "fair comment" is no more exclusively for the jury in one view of the nature of the right than in the other. In my opinion, there is in this case, in the language of Willes J.

(1) L. R. 7 C. P. 606.
(2) 3 B. & S. 769.
(3) 20 Q. B. D. 275.
(4) L. R. 4 Q. B. 73.
(5) (1859) 6 C. B. (N.S.) 514.
(6) (1834) 1 C. M. & R. 250; 40 R. R. 547.

above cited, no evidence on which a rational verdict for the plaintiff can be founded, and the defendants are therefore entitled to have judgment entered for them. In this view it is not necessary to consider the grounds on which a new trial is asked for; but if there was any evidence fit to be considered by a jury, I am clearly of opinion that the verdict was against the weight of evidence.

Further, as to misdirection, I think that, though at the outset of his summing-up the learned judge correctly laid down the law as to the extent of the defendants' right of criticism, the later part of his summing-up may have helped the jury to apply the standard of their own taste to the appreciation of the thing criticized, and to measure the rights of the critic accordingly. We have had excerpts from the play, including the songs and the stage directions, read to us; and I think it right to say that, in my opinion, it would be matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism upon such a production.

Stirling L.J. and Mathew L.J. concurred.

Judgment entered for defendants

Solicitors for plaintiff: *Law & Worssam, for Bond & Pearce, Plymouth.*

Solicitors for defendants: *Crowders, Vizard & Oldham, for Rooker, Matthews, Harrison & Co., Plymouth.*

E. L.

1903
May 9.

KAUFMAN *v.* GERSON.

Conflict of Laws—Agreement made Abroad to stifle Foreign Prosecution—Agreement not illegal where made—Whether enforceable here.

The husband of the defendant having fraudulently misappropriated in France certain moneys of the plaintiff, the plaintiff threatened to prosecute him in the French Courts. Thereupon the defendant, by an agreement made in France, agreed to pay to the plaintiff by instalments out of her own money the amount so misappropriated by her husband, upon the terms that the plaintiff should abstain from prosecuting. The agreement was intended by the parties to be wholly performed in France, and by the French law that agreement was not invalid. An action having been brought in this country to recover instalments due under the agreement:—

Held, that as by the law of the country where the contract was made and was to be performed the contract was not invalid, the action was maintainable here.

TRIAL before Wright J. without a jury.

Previously to November, 1897, the plaintiff had advanced to one Emile Gerson, the husband of the defendant, money to be used for the purchase by Gerson of skins, which were to be sold for the joint benefit of the plaintiff and Gerson. Gerson, instead of applying the money to the purpose intended, appropriated it to his own use. The conduct of Gerson in so misappropriating the money amounted to a criminal offence by the law of France, and the plaintiff threatened to take criminal proceedings in the French Courts. In order to save her husband from being prosecuted, the defendant, on November 16, 1897, entered into an agreement in writing with the plaintiff in Paris that, in consideration of the plaintiff forbearing to prosecute her husband, Emile Gerson, she would within a period of three years pay to the plaintiff out of her own money the amount of her husband's misappropriation. By the law of France this agreement was legal and enforceable. The defendant at various dates paid to the plaintiff under the said agreement sums amounting to 801*l.* 11*s.* 7*d.* The action was brought to recover a further sum of 134*l.* 9*s.* 1*d.* due under the agreement. The defendant contended that the

agreement was not enforceable in this country, and counterclaimed for the return of the 801*l.* 11*s.* 7*d.* paid under it.

Montague Lush, *K.C.*, and *Israel Davis*, for the plaintiff.

Montague Shearman, *K.C.*, and *Eustace G. Hills*, for the defendant. The arguments and authorities relied on sufficiently appear from the judgment.

May 9. WRIGHT J. The question to be determined in this case, as it stands at present, is whether the Courts of this country ought to enforce a contract made, and intended to be performed in, a foreign country, and according to the laws of that country, the contract being valid and enforceable according to those laws, but such that, if it were an English contract, the Courts of this country would refuse to enforce it on grounds of public policy or of undue influence. The question is of course not novel, but the authorities leave room for argument as to their application to this case.

The facts are in brief these: The plaintiff Kaufman in France placed in the hands of Gerson, as a friend whom he wished to assist, a sum of money to be used in buying skins to be dressed and sold for their joint benefit. Gerson appropriated part of the money to his own use instead of applying it in buying skins. His conduct was criminal in France, and a prosecution was threatened. In order to avoid a prosecution, and to protect the good name of Gerson's children, his wife, the present defendant, under the influence of Kaufman's threat and at his instance, agreed in writing to make good by instalments out of her own property the amount of the defalcation, on the express terms that there should be no prosecution on the part of Kaufman. This agreement was made in France, and it was intended by the parties to be governed by French law, and to be wholly performed in France. The defendant was English by birth; her husband was a German by birth; both were at the time of the agreement domiciled in France. According to the uncontradicted evidence of the single witness called as an expert in French law, and to some authorities which he cited,

1903

KAUFMAN v. GERSON.

Wright J.

the agreement was not invalidated in France, either on the ground of the compromise of a criminal charge, or on the ground of oppression or undue influence, or on the ground of want or illegality of consideration; and for the purposes of to-day I must accept that evidence. The wife being now resident in England, and having property here, this action is brought against her to recover instalments due and payable under her agreement. It is contended on her behalf that the consideration for the agreement is, according to English law, illegal and contrary to public policy, and that the agreement was obtained by means of undue influence and threats, and therefore ought not to be enforced in this Court.

The fraud of Gerson was not, in my opinion, of such a kind as to have been in this country the subject of an indictment for larceny at the time when it was committed, which was before the commencement of Sir R. Finlay's Act (1 Edw. 7, c. 10) for amending the law of larceny. Gerson did not obtain the money by any trespass or trick. He was bound to account for the money, but he was not a bailee of it. There was plainly not embezzlement. Nor was there such agency or proof of such a direction in writing as would have satisfied ss. 75–79 of the Larceny Act, 1861. I will, however, assume that the fraud would have been criminal if committed in England, or that the English rule against agreements in compromise of crime may extend to cases of frauds criminal by foreign laws. At any rate, on the evidence the duress or influence was, I think, such as would by English law have vitiated the agreement.

The contract having been made in France by parties domiciled there, who intended it to be wholly performed in France and according to French law, it must primâ facie be taken to be governed by French law, and, it being taken to be valid by that law, the Courts of this country will entertain an action upon it, and will give such effect as they can give to the rights of the parties as those rights are ascertained by French law, unless the defendant can shew that the case is within one or other of certain exceptions, the general nature of which is well defined, and most of which are not applicable in this case.

To use the language of Chitty J. in *In re Missouri Steamship Co.* (1), the contract is not impeached on the ground that it is "of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the law of civilized countries." It is not impeached on the ground that the enforcement of the contract would be injurious to any public interest of this country. It is impeached principally on the ground that such a contract for the stifling or compromise of a threatened criminal prosecution is contrary to the views of public policy which the Courts of this country hold ought to prevail within the limits of their jurisdiction; and it is argued that a foreign contract can never be enforced here if it be a contract which on any ground could not be validly made here for performance here. There are no doubt expressions in some of the text-books and dicta in some cases which are wide enough to cover such a proposition. But I know of no actual decision which supports it, and it appears to be inconsistent with the decisions in several cases, the most important of which is *Santos* v. *Illidge* (2), where it was held in the Exchequer Chamber that an action could be maintained in this country upon a contract made and intended to be wholly performed in Brazil, and valid in that country, for the sale of slaves to be employed there, and this although the defendants were British subjects resident and domiciled here, and would have committed a felony if they had made the contract here for performance in the Queen's dominions. The point argued and expressly decided was whether the Slave Trade Acts in force at the date of the contract prohibited British subjects from engaging in the slave trade in civilized countries in which the trade was lawful by the local law; but the negative of the general proposition maintained by the defendant is necessarily implied in the judgment.

So in *Quarrier* v. *Colston* (3) Lord Lyndhurst had held (before 8 & 9 Vict. c. 109) that an action might be maintained here on a contract made even between British subjects in France for the repayment of money lent for gambling, the

(1) (1888) 42 Ch. D. 321, at p. 325.

(2) (1859–60) 6 C. B. (N.S.) 841; 8 C. B. (N.S.) 861.

(3) (1842) 1 Ph. 147.

1903

KAUFMAN v. GERSON.

Wright J.

contract being valid there. And in *Robinson* v. *Bland* (1) Lord Mansfield seems to have been of the same opinion as regarded contracts intended to be performed in the country where they are made. And in *Biggs* v. *Lawrence* (2) it was held that an action would lie upon a contract made by foreigners in Guernsey for a sale to be completed there of spirits which the parties knew were to be smuggled into England. Lastly, in *In re Missouri Steamship Co.* (3), in the converse case of a contract void in the country where it was made on grounds of public policy as there established, but legal where the performance was to be, the Court acted on the principle that it must discover from all the circumstances by what law the parties meant, or must be taken to have meant, the contract to be governed, and must give effect to its provisions accordingly, unless those provisions are contrary to morality or positive law.

Against these authorities the defendant relies on *Grell* v. *Levy* (4) and *Hope* v. *Hope* (5), to which may be added *Rousillon* v. *Rousillon*. (6) The doubt expressed by Wilmot J. in *Robinson* v. *Bland* (1) appears to refer to contracts of a plainly immoral kind, as for prostitution. *Grell* v. *Levy* (4) is plainly distinguishable on the ground that the contract, which was champertous, was to be performed here, and even so the Court thought it important to observe that the plaintiff was an attorney and officer of the Court. So in *Rousillon* v. *Rousillon* (6) the actual decision was that the agreement was not open to the objection of its being in undue restraint of trade according to our law, and the dictum of Fry J., that if it had been obnoxious to that objection an action upon it could not have been maintained here, is referable to the fact that it was sought in the action to restrain the defendant from trading in this country, so that the agreement was to be considered as an agreement intended to be performed here. The actual decision in *Hope* v. *Hope* (5) may be explained in the same way, since the agreement, specific performance of which was sought,

(1) (1760) 1 W. Bl. 256.
(2) (1789) 3 T. R. 454; 1 R. R. 740.
(3) 42 Ch. D. 321.
(4) (1864) 16 C. B. (N.S.) 73.
(5) (1857) 8 D. M. & G. 731.
(6) (1880) 14 Ch. D. 351.

was partly for payments to be made by a husband to his wife in consideration of her agreeing to facilitate a divorce in this country, and partly for depriving the husband of the control of his infant children. The dictum, however, of Turner L.J. is perhaps not fairly capable of this explanation. He is reported to have said: "I think that, when the Courts of our country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country or contrary to its policy the Courts of this country cannot, as I conceive, be called upon to enforce it." This opinion, if intended to be understood as applying to contracts intended to be performed in the country where they are made and are valid, as well as to contracts which are to be performed here, appears to be inconsistent with *Santos* v. *Illidge* (1) and *Quarrier* v. *Colston* (2), and with the principle on which *In re Missouri Steamship Co.* (3) was decided; and I am bound to follow those decisions on this point.

The second ground on which the contract in the present case is impeached is that it was obtained by the undue influence or duress of a threat to prosecute the husband for crime. If this objection is to be regarded as based on considerations of public policy, the same answer applies as in the case of the first objection. It seems, however, to be more in the nature of an objection to the proof of consent of the defendant to the contract, a consent induced by duress or undue influence being by English law treated as no consent. If this be the correct view, it would seem that the law of the country in which the contract is made and is to be performed, and in which the parties are domiciled, ought to prevail unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilised institutions of law—a description which would

(1) 6 C. B. (N.S.) 841; 8 C. B. (N.S.) 861. (2) 1 Ph. 147.
(3) 42 Ch. D. 321.

1903

KAUFMAN v. GERSON.

Wright J.

be applicable to such a case as that of consent obtained, e.g., by physical torture, or by the use of drugs, but which cannot properly be applied to this case.

If these views are correct, it follows that the counter-claim for return of moneys already paid under the agreement fails. And even if the Court ought to refuse its aid to the plaintiff, it would not follow that the counter-claim ought to be allowed. When a contract made, and intended to be performed, in France and according to French law, and valid under that law, has been partly performed there, I cannot see any ground upon which a Court in this country can undo what has been legally and properly done according to the law of the country in which it had to be done.

I have so far dealt with the case on the assumption that the law of France is as stated by the only witness examined on that point. But, inasmuch as that evidence was somewhat slender, and as the defendant's counsel thought they were safe in relying on the law of this country as laid down in several text-books and by Turner L.J. in *Hope* v. *Hope* (1), and therefore thought the French law immaterial, it is, I think, right to give the defendant an opportunity to shew by evidence that the contract was not valid in France. If she desires to do that, and gives notice to that effect before Wednesday next, there will be no judgment until I have heard the further evidence. If notice is not so given, I shall on application give judgment for the plaintiff on the claim and counter-claim.

Order accordingly.

Solicitors for plaintiff: *Leggatt, Rubinstein & Co.*
Solicitors for defendant: *Dixon, Weld & Dixons.*

(1) 8 D. M. & G. 731.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
May 7.

MAYNARD *v.* THE CONSOLIDATED KENT COLLIERIES CORPORATION, LIMITED.

Company—Transfer—Insufficient Stamp—Refusal to register—Right to go behind that which appears in Document—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4; *s.* 17.

A transfer to the plaintiff of shares in the defendant company was presented for registration. The stamp on the transfer was in accordance with the consideration stated on the face of it, but it was discovered that the consideration so stated was less than that which had been given. The directors thereupon refused to register the transfer. In an action to recover damages arising out of this refusal:—

Held, that since a transfer not duly stamped according to law would not, by reason of s. 14, sub-s. 4, of the Stamp Act, 1891, be available in a Court of law either to enforce rights of the company against the transferee, or to justify an alteration of the register of shareholders, the directors were entitled to refuse to register the transfer, and that in determining whether the transfer was duly stamped they were entitled to go behind that which appeared on the face of the document.

APPLICATION for a new trial or that judgment should be entered for the plaintiff in an action tried by Lawrance J. with a jury.

The action was brought to recover damages from the defendants in consequence of an alleged wrongful refusal to register a transfer of shares of the company. The facts out of which the claim arose were as follows. George Tucker was a shareholder in the Kent Collieries Corporation, Limited, which went into liquidation for the purpose of being amalgamated with other companies in the defendant company. At the time of the liquidation 450*l.* was due from Tucker for unpaid calls, and the assets of the liquidating company, including the sum so due from Tucker, were assigned to the defendants, who gave him notice of the assignment. Upon the amalgamation taking effect Tucker was registered as the holder of 1300 shares of the defendant company, and by the articles of the company they had a lien on these shares for his debts, liabilities, and engagements to them, and, unless otherwise agreed, the registration of a transfer of shares was to operate as a waiver of the company's

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

lien. Under the articles 10 per cent. interest, or such other rate as the board should determine, was due upon the sums owing from Tucker for the unpaid calls from the dates at which the same became due. The shares of the defendant company were 1*l.* shares on which a sum of 17*s.* 7*d.* per share was credited as paid, leaving 2*s.* 5*d.* per share due to make them fully paid. Under these circumstances the plaintiff arranged with Tucker to purchase the shares, and on April 12, 1901, they both called at the office of the company and saw the secretary and the chairman. The plaintiff was told that the sum of 158*l.* 8*s.* 3*d.* was the balance due on the 1300 shares to make them fully paid, and his case was that the secretary and the chairman of the company represented to him that on payment of that amount Tucker could make a good and effectual transfer of the shares to the plaintiff. The case for the company, so far as it related to representations made at the meeting at the office, was that the plaintiff had been informed of Tucker's outstanding liability on the shares in respect of the unpaid calls and interest; that he objected to the rate of interest, and that he was told that the transfer might go forward subject to the decision of the directors as to the rate of interest that should be charged. The plaintiff on the same day lodged at the office of the defendants a transfer of the 1300 shares by Tucker to him, the consideration stated in the transfer being 158*l.* 8*s.* 3*d.*, and a transfer receipt was forwarded to him by the secretary. That sum was paid to the defendants, and a further sum was paid to Tucker as part of the price of the shares. The transfer was stamped with an amount appropriate to the consideration stated on the face of the deed, namely, 158*l.* 8*s.* 3*d.* The plaintiff required that the defendants should register the transfer, and the defendants refused for a long time to do so, but on March 7, 1902, they issued a certificate and inserted the plaintiff's name in the register of shareholders as holder of 1300 fully paid shares; but the plaintiff alleged that he received no notice of this till April 7, 1902. He further alleged that between April 12, 1901, and April 7, 1902, the value of the shares had depreciated, and that during that time, not being on the register of members, he had been unable to realize the shares,

and after that date could only do so at a considerable loss, whereby he had sustained damage which he sought to recover from the defendants. The defence was that the defendants' refusal to register the transfer was justified by reason of their lien on the shares, and also by reason of the consideration for the transfer not being truly stated and the transfer not being properly stamped.

By the articles of association of the defendant company the instrument of transfer of any share was to be signed by the transferor and transferee, and the former was to be deemed to remain the holder of such share until the name of the transferee should be entered on the register. The instrument of transfer was to be in writing in the usual form, or in a form which stated that the transferee was to hold the shares subject to the several conditions on which the transferor held the same immediately before the execution of the transfer. The board might decline to register any transfer of shares, not being fully paid, upon which the company had a lien. All instruments of transfer which should be registered were to be retained by the company.

At the trial the learned judge left the following questions to the jury: (1.) Did the chairman or the secretary of the defendant company represent to the plaintiff that by payment of 158*l.* 8*s.* 3*d.* he could have a transfer from Tucker? Answer: Yes. (2.) Did the plaintiff rely on such representation? Answer: Yes. (3.) Was the consideration properly and truly described in the transfer? Answer: No. (4.) Did the defendants wrongfully refuse to register the transfer? Answer: No. The jury were asked as to the amount of damages, if the plaintiff should be entitled to any, and they assessed them at 150*l.* On further consideration the learned judge entered judgment for the defendants.

The plaintiff appealed.

May 6. *Gore-Browne, K.C.*, and *G. A. Bonner*, for the plaintiff. It must be admitted that 158*l.* 8*s.* 3*d.* was not, properly speaking, the consideration for the transfer of these shares. If, however, a transfer appears to be duly stamped on

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

the face of it, the company cannot refuse to register the transferee as a shareholder on the ground that the consideration for the transfer is not truly stated, and that, if it were, a higher stamp duty would be payable. It is suggested that, if the transfer in question were registered, the officer of the company who registered it would render himself liable to a penalty under s. 17 of the Stamp Act, 1891. There are more answers than one to that suggestion. First, the section cannot be intended to make it the duty of an officer coming within it to go behind the face of the instrument, and try the question whether the consideration is truly stated—a question which might involve conflicting evidence or for some other reason be a difficult one. Secondly, the secretary or other servant of a trading corporation is not within the section at all. He is not "a person whose office it is to enrol, register, or enter in or upon rolls, books, or records any instrument chargeable with duty." The section contemplates a registrar or other such official charged with a statutory duty to enrol or register documents which have by statute to be enrolled or registered. A secretary or other employee of a company may in a loose sense be called an official of the company, but he is really a servant of the company, and his duty is to them. He has no statutory duty in his own independent capacity to enrol or register transfers. An employee of a bank whose duty to his employers was to file a certain class of documents, such as bills, received by the bank, would not be an official whose duty it was to register the documents within the section. Thirdly, there is no registration of the transfer, strictly speaking. The registration required by s. 25 of the Companies Act, 1862, is of the transferee as a shareholder. No statute requires a registration of the deed of transfer. Of course as a matter of business the transfers lodged with the company would be preserved, and some means adopted by which they could be readily referred to, when necessary. But there is no enrolment or registration of them within the meaning of the section. The words "duly stamped" in s. 17 mean appearing to be duly stamped on the face of the instrument. Any other construction would not be reasonable as a matter of business.

The company and their servants have no means of effectually trying the question whether the consideration is truly stated in a transfer. It was held in *Gatty* v. *Fry* (1) that "duly stamped" in s. 48 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), meant "appearing to be duly stamped" on the face of the instrument. That section relates to the admissibility of the instrument in evidence; but the principle upon which the case was decided is very material to the present case. The Act protects the revenue against misstatement of the consideration in the instrument by other sections. Sect. 5 of the Stamp Act, 1891, throws upon the persons executing the instrument the duty of setting out in it truly all matters upon which the liability to duty, or the amount of the duty, depends under a penalty. Possibly, if the officer to whom an instrument is presented for registration has brought to his notice facts pointing to the conclusion that the instrument does not truly state those matters, it might be his duty as a citizen to bring the case to the notice of the revenue authorities, but not to refuse to register the transfer or other document. The secretary of the company has nothing to do with the duty of seeing that the consideration for the transfer is truly stated.

Hammond Chambers, *K.C.*, and *C. C. Salt*, for the defendants. The company were entitled to refuse to register the transfer on the ground that, the consideration being untruly stated, the instrument was not duly stamped. "Duly stamped" means stamped with the proper ad valorem duty upon the true consideration: see s. 15 of the Stamp Act, 1891. The registration of the transfer is in the case of this company required by statute. Sect. 22 of the Companies Act, 1862, enacts that the shares of any member of a company under the Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company. The articles of association of this company provide in terms for the registration of the instrument of transfer. There being therefore a statutory duty to register the transfer, the person in the employ of the company whose duty it is to do so is a person who comes within s. 17 of the Stamp Act, 1891, and

(1) (1877) 2 Ex. D. 265.

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

will be liable to a penalty, if he registers a transfer which he has reason to believe is not duly stamped. Possibly it may not be his duty to institute an inquiry into the question whether the consideration is truly stated, if the instrument appears to be duly stamped on the face of it, and no facts come to his knowledge indicating the contrary. But, if he has notice that the consideration is not truly stated and the instrument is therefore not duly stamped, he clearly would be guilty of a breach of duty under s. 17, if he registered the transfer. Further, it is contended that, if facts came to his knowledge arousing suspicion that the consideration was not truly stated, and on inquiry unsatisfactory and contradictory accounts were given, as was the case here, it would not be his duty to register the transfer until the matter was cleared up satisfactorily. The officer of the company can make inquiries, and if necessary refer the matter to the inland revenue authorities. Even apart from s. 17, it is submitted that a company and their officers are not bound to register an instrument of transfer by which they know, or have reason to believe, the revenue is being defrauded. A transferee cannot be heard to say that, though the transfer was not in truth duly stamped, it was the duty of the company to register it, and that he can sue for damages for breach of that duty. If the plaintiff had come to the Court to ask for an order to the company to register under the Companies Act, he would have failed on its being shewn that the transfer was not duly stamped. It is a complete answer to the claim of the plaintiff that he must tender a document which would be available to the defendants in a Court of law. In *Robinson* v. *Vernon* (1) the objection was taken too late; but in this case it was taken at the proper time—that is, when the document was tendered for registration.

G. A. Bonner, in reply, referred to *Williams* v. *Jarrett* (2), *Whistler* v. *Forster* (3), *Bellamy* v. *Saull* (4), and *Austin* v. *Bunyard*. (5)

(1) (1860) 29 L. J. (C.P.) 310.
(2) (1833) 5 B. & Ad. 32.
(3) (1863) 14 C. B. (N.S.) 248; 32 L. J. (C.P.) 161.
(4) (1863) 4 B. & S. 265; 32 L. J. (Q.B.) 366.
(5) (1865) 6 B. & S. 687; 34 L. J. (Q.B.) 217.

COLLINS M.R. The argument in this case has travelled over a wide area, but in the result it is reduced substantially to one matter. The action is brought by the plaintiff against the defendants for refusing to register a transfer of shares in his favour by one Tucker. The short history of the case is that Tucker was a shareholder in a company started for the purpose of prospecting for and working coal in Kent. That company was wound up for the purpose of being amalgamated with other companies in the defendant company. For the purpose of the consolidation the interests of the shareholders of the other companies were ascertained and agreed upon, and Tucker became the registered holder of 1300 shares in the defendant company of the nominal value of 1*l.* each, of which 17*s.* 7*d.* was credited as paid. There was a sum of money due from Tucker for unpaid calls in the other company amounting to something like 450*l.*, but nevertheless he was put on the register of the defendant company. There was due on the shares that he acquired 2*s.* 5*d.* per share to make them fully paid, and there was also due from him interest on the unpaid calls that I have mentioned at the rate of 10 per cent., subject to the power of the directors to reduce the rate of interest. In that state of affairs the plaintiff bargained with Tucker for the transfer of the shares, and they both attended at the office of the defendant company. The plaintiff wished to know how much still remained unpaid on the shares payment of which would make them fully paid, and obtained the information that 158*l.* 8*s.* 3*d.* still remained due. But simultaneously he was told of the claim for arrears and interest. There was a discussion, and he was unwilling to pay interest at the rate of 10 per cent., and was desirous that the rate should be modified. On this point the chairman of the company was seen. Of course he had no power to bind the company, and, according to the evidence, did not pretend to do so; but I think the fair inference from what occurred is that the question of interest was to be left for the consideration of the board, and that, subject to that, the transfer should go forward. That seems to me to be a clear intimation that the transfer, if executed, would be subject to the question of interest, the determination

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

Collins M.R.

of which had been left to the board. Unless the terms as to interest were modified, the obligation would remain to pay at the rate of 10 per cent., and the shares could only be transferred to the plaintiff subject to that obligation. Nothing further was done, and I think on the evidence the jury were entitled to find and have found that nothing in the nature of a transfer binding on the company was made or agreed upon at that time. Thereupon a transfer was executed which bears on its face the statement that the consideration was the sum of 158*l.* 8*s.* 3*d.*, and a transfer receipt was sent to the plaintiff. He demanded that the transfer should be registered, but this was refused. The date of the interview was April 12, 1901, and after long negotiations and a refusal to register the transfer, continuing until March, 1902, the company ultimately agreed to register it, and waived their claim for calls and for interest. The plaintiff claims that he ought to have been put on the register in the previous April when the shares were worth 9*s.* a share, whereas at the date when he was put on the register they had gone down to 9*d.* a share, and he claims the difference in value at the two dates. Certain questions were put to the jury, and the learned judge was of opinion that, on the findings, judgment ought to be entered for the defendants, but by way of precaution he left it to the jury to assess the damages, which they did at 150*l.* Judgment was entered for the defendants, and the plaintiff claims that, notwithstanding that judgment, he is entitled to the damages assessed by the jury. The whole point turns upon the question whether the directors were entitled to withhold the registration of the transfer, and in their pleadings they justify their doing so by reason of their lien for the debts and liabilities of Tucker, and in consequence of the consideration for the transfer not being truly stated and the transfer not being properly stamped. The consideration stated on the face of the transfer was the amount unpaid on the shares; but the secretary, having heard the parties refer to what had passed between them, came to the conclusion that the consideration was not truly stated, and that there had been other payments than that stated on the face of the transfer, and that therefore

the transfer was in effect a bad one. This contention is based on s. 14, sub-s. 4, of the Stamp Act, 1891, by which an instrument that is not duly stamped in accordance with the law in force at the time when it was first executed cannot, except in certain cases, be given in evidence. It is not contended that the consideration was truly stated; but it is said on behalf of the plaintiff that, nevertheless, the company had no right to refuse to register the transfer. It is said that the duty of the secretary whose function it was to deal with the registration is to be found in s. 17 of the Act, and is no more and no less than that which is there described. That section says: "If any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instrument chargeable with duty enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of ten pounds." It is questioned whether the secretary comes within the description in the section; but it is said that, assuming that he does, it is no part of his duty to look beyond the face of the document before him, so that if the stamp is adequate to the consideration which appears on the face of the document he has no right to travel beyond that and find out what the consideration is in fact. The effect would be that, as the stamp in this case was in accordance with the consideration stated, no objection could be taken to the transfer. No authority has been cited in support of this view, and, indeed, there is direct authority to the contrary effect. Apart from authority, such a conclusion is opposed to common sense, because under s. 14, sub-s. 4, an instrument which is not stamped in accordance with the law is not available for any purpose whatever. An instrument is not stamped in accordance with the law when the consideration is not properly stated and the stamp is in accordance with this improper statement, and to hold that there is no power to go behind the instrument itself would be to give no effect to the express provisions of the Legislature. The directors in this case had to make up their minds whether they would accept the transfer. It was a serious matter to them, because they keep the transfer as a justification for taking the name of the

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

Collins M.R.

transferor off the register and substituting that of the transferee. If the matter came to be considered in a Court of law, and it were proved, as it could be in this case, that the consideration was not properly stated, the transfer would be inadmissible as evidence, and the directors would have no justification for having taken one name off the register and put another on it. It seems to me that this consideration affords an absolute justification to the directors in their refusal to register this transfer. It was the duty of the plaintiff to tender a transfer which was right in all respects in point of law, and that he never did; and unless he did that the company were under no obligation to put him on the register. There were other points raised into which I do not think it is necessary to go, for either of the points with which I have dealt appears to afford a complete answer to the plaintiff's appeal. The judgment of the learned judge was perfectly right, and this appeal fails.

STIRLING L.J. I am of the same opinion. I think that the objection which was taken from the first by the company, on the application to register the transfer, that the consideration was not properly stated on the face of the transfer, and that the transfer was insufficiently stamped, was a valid one. It was proved at the trial, as is shewn by the verdict of the jury, that this objection was well founded in fact, and, in my judgment, it was also well founded in law. Shares under the Companies Acts are transferable in the mode which is prescribed by the articles of association of the particular company. In this case the articles of association require that the transfer shall be signed by the transferor and the transferee, and that it shall be in the usual form according to which the transferor transfers his shares to the transferee, and the transferee enters into an agreement with the company to hold the shares subject to certain conditions, the effect of which is that the shares continue subject to the liabilities that existed at the time of the transfer. Then it is provided that every instrument of transfer is to be left at the office for registration, and is to be retained by the company. The company have two objects in

view in making these stipulations. In the first place, the transfer is to be such an instrument as may be used by the company as a means of enforcing the obligations of the transferee, if ever it becomes necessary on the part of the company to enforce them; and, in the second place, it is to be a document which, if acted on, will justify the company in the alteration of the register if that alteration should ever be called in question in a Court of justice. It appears to me in these circumstances that the company cannot be called upon to register a transfer which would not be available to them in a Court of justice, if they were desirous of making use of it either for the purpose of enforcing their rights against the transferee or of defending themselves if attacked for what they have done on the faith of it.

This principle has been acted upon with reference to dealings between the vendor and the purchaser of real estate. In *Whiting* v. *Loomes* (1), in the Court of Appeal, it was decided that a purchaser of real estate is entitled to raise the objection that any deed of title is improperly or insufficiently stamped. In that case a mortgage deed was stamped only with a 10*s.* stamp, and the objection was taken by the purchaser that it was insufficiently stamped, and it was held that he was entitled to require the mortgage deed to be stamped before completion with the full duty at the vendor's expense notwithstanding that the mortgagee might have consented to join in the conveyance. James L.J. said: "The purchaser says, 'Here is a title-deed. It ought to be stamped with a proper stamp, and it is not so stamped.' As long as it is not stamped with a proper stamp he cannot use it for any purpose, whether to defend his title or attack a wrong-doer. It is impossible to say he will not want it." Cotton L.J. says: "The purchaser may clearly require this as a deed for certain purposes, even if he may not hereafter require it as a mortgage deed. Then can it be put in evidence? It cannot as a mortgage deed, because it is not properly stamped. But it is said it is sufficiently stamped as a deed, and therefore can be put in evidence. It is not a deed simpliciter, but what is described in the schedule

(1) (1881) 17 Ch. D. 10.

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

Stirling L.J.

to the Act as a mortgage deed; and when we look at the schedule we find that the only thing that can be properly stamped with a 10*s.* stamp is a 'deed of any kind whatever not otherwise described in this schedule.'" Lush L.J. puts the matter shortly: "The Court is not entitled to speculate whether the purchaser may or may not have occasion to use the deed. A purchaser is entitled to have every deed forming a step in his title in such shape that he can, if he need it, give it in evidence." It seems to me that that principle applies to the present case, and that the company were entitled to say that they ought to have a transfer such that if they desired they could put it in evidence for either of the purposes which have been mentioned.

It is said, however, that the deed was properly stamped on the face of it—that is to say, that a proper stamp was put on it having regard to the consideration stated, and it is contended that it is impossible on a question as to the stamp to go behind that which appears on the face of the document. In my judgment that is not in accordance with the law. The Master of the Rolls has already pointed out the reasons for this view, and I only desire to refer to one authority on the point. *Field* v. *Woods* (1) was an action against the drawer of a cheque payable to the drawee, and the plea was that "the defendant did not make the said draft or order in the above count mentioned in manner and form, &c." At the trial the draft was unstamped, and the defendant's counsel, in opening his case to the jury, proposed to prove that the draft was post-dated, for which reason, he contended, it could not be put in evidence, having no stamp. The learned judge was of opinion that the post-dating of the draft was a defence which ought to have been pleaded, and he therefore rejected the evidence tendered for the defendant, and the plaintiff had a verdict. The Court of King's Bench held that a wrong view had been taken. Lord Denman said: "The plaintiffs proceed upon an instrument which appears primâ facie good; but then, upon the evidence at the trial, something arises which makes a stamp requisite. In *Dawson* v. *Macdonald* (2) the action was brought

(1) (1837) 7 Ad. & E. 114. (2) (1836) 2 M. & W. 26.

on a bill of exchange; the defendant had found that the bill was written on paper improperly stamped, and he attempted to plead that fact in addition to a plea of non-acceptance; but Parke B. said, 'The only consequence of the wrong stamping is, that the instrument cannot be given in evidence.' There can be no question that this defence is admissible under a plea that the defendant did not make the draft." Littledale J. said: "Then is the objection one which it is necessary to shew in pleading? I think not. The Acts being prohibitory, the moment the cheque was produced, if the defect appeared, the judge would say that he could not allow the document to be received. Here, however, it was received; and the objection was not made apparent till the opening of the defendant's case, when he offered evidence to shew the defect"; and again: "The judge could do nothing, in the first instance, but admit the document, subject to an objection to be raised afterwards by proof." Patteson J. said: "Supposing, therefore, that the document here had been given in evidence, the Acts say that it shall not be available. But it was given only as evidence primâ facie, and subject to the objection which was raised by extrinsic evidence"; and again: "To ascertain whether that condition is fulfilled or not, there must be extrinsic evidence; and such evidence, to invalidate the draft, must be given by the defendant." That is a clear authority that in a case where the defect of stamp does not appear on the face of the document, extrinsic evidence is admissible to shew the defect. That is applicable to the present case.

It appears to me that if the company had accepted this transfer they might have been in the difficulty that if they attempted to use it in a Court of law extrinsic evidence might have been produced to shew that it was not properly stamped, and was therefore not available as evidence. On that ground I think the judgment of the learned judge was well founded, and that the appeal should be dismissed.

MATHEW L.J. In this case the plaintiff relied on the answers of the jury to the first and second questions that were put to them. If those answers are taken alone there would

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

Mathew L.J.

appear to be an end of the case; but they must be read in conjunction with the answer to the question, "Did the defendants wrongly refuse to register the transfer?" to which the jury answered, "No." I can well understand why that conclusion was arrived at. True, it was admitted that the statement was made that upon the payment of 158*l.* 8*s.* 3*d.*, the balance of calls unpaid on these shares, a transfer of the interest in them might be made; but at the same time there was a question about the interest, and the plaintiff was explicitly informed that, although the transfer might go forward for the moment, the matter must come before the board before the transfer could be registered. Before the time came for taking the opinion of the board on that question another difficulty presented itself. The plaintiff had inserted in his transfer a statement that the consideration was 158*l.* 8*s.* 3*d.*, although the shares of the company were then being quoted in the market at 8*s.* or 9*s.* per share, and upon that the secretary asked for an explanation. It turned out in the end that the statement that the shares were sold at 2*s.* 5*d.* was untrue. It was essential that the plaintiff should put himself in a position to produce a proper document shewing the transfer. It is said by the defendants that they are entitled to rely on the objection that there was no proper transfer of the shares, and I see no answer to that as a defence to this action. Now what occurred subsequently? The plaintiff was demanding to have his name registered as a shareholder in the company. The defendants had to consider whether they would defend any proceedings taken by the plaintiff, as they have had to in this action at great expense, for the purpose of settling the question, and they gave way and registered the shares in the plaintiff's name. What followed was that an action was immediately brought, and this fact that the company did not consider it worth their while to continue to fight the question of registering the transfer is sought to be used as evidence that they were wrong throughout. I cannot assent to any such view. I can quite understand why the company took the course they did. The plaintiff has failed to shew he was entitled to be registered

without producing a properly stamped document. That it was not properly stamped is clear. In my judgment the appeal fails.

C. A. 1903

MAYNARD v. CONSOLIDATED KENT COLLIERIES CORPORATION.

Appeal dismissed.

Solicitors for plaintiff: *Burnie & Co.*

Solicitors for defendants: *Dale, Newman & Hood.*

A. M.

LYON & CO. *v.* LONDON CITY AND MIDLAND BANK.

1903
March 17, 18.

Fixtures—Hiring Agreement—Chairs fastened to Floor of Place of Entertainment—Mortgage of Building and Fixtures—Entry of Mortgagee into Possession—Right of Removal by Owner.

Chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority:—

Held, that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures.

ACTION tried by Joyce J., sitting as an additional judge of the King's Bench Division, without a jury.

The action was brought to recover certain chairs or seats, or in the alternative their value, under the following circumstances. On August 7, 1901, the plaintiffs, a firm of upholsterers, part of whose business consisted in letting chairs for hire for use in places of public entertainment, received from one Brammall, who was the owner and occupier of the Brighton Hippodrome, a memorandum in writing, of which the material part was as follows: "Please to supply on hire 345 buttoned back lift-up-seat crimson velvet arm-chairs and 344 plain back ditto for use at above Hippodrome, for the loan of which I agree to pay the sum of 20*l.* per week for not less than twelve weeks certain, payable weekly, commencing on September 1,

1903

LYON & Co. v. LONDON CITY AND MIDLAND BANK.

1901. In default of any one week's payment you are to be at liberty to remove your goods without let or hindrance of any kind. It is understood that the whole amount paid for hire is to be deducted, should I elect within three months to purchase the goods for the sum of 676*l.* to be paid in cash." The plaintiffs accepted the order, and in due course supplied the chairs on the terms contained in the memorandum. When the chairs were delivered, they were, in compliance with the requirements of the Brighton Town Council, fastened to the floor of the Hippodrome. The mode of fastening was as follows. Cast-iron standards were arranged in rows across the floor, the adjoining standards in each row being at equal distances from each other. Between each two adjoining standards a seat was attached on pivots projecting from the standards, the seat being so placed on the pivots as to allow of its being lifted up and let down; the back of the chair was formed by a wooden board, which was kept in position by screws passing through flanges in the standards. Each standard was fastened to the floor by four screws passing through circular holes in the flange at the foot of the standard. The floor to which the chairs were thus fixed was composed of wooden boards lying on concrete, to which they were fastened by four-inch iron nails, driven into the concrete before it hardened.

On October 18, 1901, Brammall, in consideration of the defendants allowing him to keep an account current at their bank and of their granting him banking facilities generally, mortgaged the Hippodrome to the defendants, their successors and assigns, "together with (in addition to any fixtures passing by reason of the conveyance hereinbefore contained) all fixtures whatsoever now or at any time hereafter affixed or attached to the said premises or to any part thereof other than and except trade machinery as defined by s. 5 of the Bills of Sale Act, 1878." The conveyance was subject to a proviso for redemption. On November 18, 1901, Brammall accepted the terms of the agreement for hiring the chairs for a further period of twelve weeks from that date; he never exercised his option of purchasing the chairs. On August 25, 1902,

the defendant bank entered into possession of the Hippodrome under their mortgage, and on September 1 the plaintiffs formally demanded delivery up of the chairs from the defendants. This demand not being complied with, the present action was brought, in which the plaintiffs claimed delivery up of the chairs, or in the alternative 676*l.*, their value; damages for detention of the chairs from the date of the formal demand, and an injunction to restrain the defendants from selling or parting with them without the consent of the plaintiffs.

H. Reed, K.C., and *Kerly*, for the plaintiffs. The chairs were not fixtures, and did not pass to the defendants under their mortgage. The mere fact that they were screwed to the floor is not enough in itself to make them fixtures; the cases shew that in order that chattels may pass as part of the freehold to which they are affixed the annexation must be such as to constitute a permanent improvement of the freehold: *Norton* v. *Dashwood* (1); *Hobson* v. *Gorringe* (2); *Reynolds* v. *Ashby*. (3) The purpose of the annexation must be inferred from the circumstances of the particular case: *In re De Falbe* (4); and if the purpose be the mere temporary improvement of the freehold or the better enjoyment of the chattels as chattels they will not pass with the freehold. Here the chairs could be easily removed without doing any injury to the freehold, and the annexation was, as must almost of necessity be the case where the chattels are the subject of a mere agreement for hire, intended to be temporary only and not for the permanent improvement of the building. Further, by allowing the mortgagor to remain in possession the mortgagees acquiesced in the agreement between the plaintiffs and the mortgagor as to the chairs: *Gough* v. *Wood*. (5)

Muir Mackenzie, and *H. C. Holden*, for the defendants. The chairs passed as fixtures to the defendants as mortgagees of the freehold. The mode of annexation was the same as in

(1) [1896] 2 Ch. 497.
(2) [1897] 1 Ch. 182.
(3) [1903] 1 K. B. 87.
(4) [1901] 1 Ch. 523. Affirmed in House of Lords sub nom. *Leigh* v. *Taylor*, [1902] A. C. 157.
(5) [1894] 1 Q. B. 713.

1903

LYON & CO. v. LONDON CITY AND MIDLAND BANK.

Hobson v. *Gorringe* (1), where a gas-engine affixed to the freehold by bolts and screws in order to prevent it from rocking was held to be a fixture passing under a mortgage of the freehold; it was further held that this was not affected by the fact of the engine being the subject of a hire-purchase agreement, which, as pointed out by Collins M.R. in *Reynolds* v. *Ashby* (2), is not an element in determining the question of the intention with which the chattel is affixed to the freehold. The mere fact that the chairs were removable does not prevent their being fixtures: per Lord Cockburn in *Dixon* v. *Fisher*. (3) It is true that in *Hellawell* v. *Eastwood* (4) it was held that chattels affixed to the freehold for a temporary purpose were distrainable for rent and did not become part of the freehold; but, as was pointed out by Blackburn J. in *Holland* v. *Hodgson* (5), that does not apply to cases where the object of the annexation is to improve the inheritance or to render more effectual the enjoyment of the premises. In the present case the chairs were intended for the better enjoyment of the Hippodrome as a building, and the object and effect of their annexation was the permanent improvement of the building as a place of public entertainment.

[They also cited *Hill* v. *Bullock* (6); *Monti* v. *Barnes* (7); *Cross* v. *Barnes*. (8)]

H. Reed, K.C., was not called on to reply.

JOYCE J. Whatever my individual opinion might have been in the absence of authority, I am bound by the decision of the Court of Appeal or of a Court of co-ordinate jurisdiction on similar facts. In my judgment there is much to be said in favour of the view of North J. in *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (9), that a mortgagor cannot confer upon his mortgagee a better title than he himself has to the property mortgaged. Only a lawyer could

(1) [1897] 1 Ch. 182.
(2) [1903] 1 K. B. 87.
(3) (1843) 5 D. 775. Affirmed in the House of Lords sub nom. *Fisher* v. *Dixon*, (1845) 12 Cl. & F. 312.
(4) (1851) 6 Ex. 295.
(5) (1872) L. R. 7 C. P. 328.
(6) [1897] 2 Ch. 482.
(7) [1901] 1 K. B. 205.
(8) (1877) 46 L. J. (Q.B.) 479.
(9) [1892] 1 Ch. 415.

suppose that the chairs in this case were the property of the mortgagees of the building, and it is somewhat surprising to find a corporation in the position of the defendants setting up such a claim. But I must decide this case in accordance with the law already laid down, and in my opinion it differs in several respects from the decisions which are relied on by the defendants. In the first place, we are dealing with seats, and not with engines, boilers, or trade machinery. Then the seats were complete in themselves and might have been used as seats without any annexation, though no doubt, apart from the requirements of the town council, it was better, considering the place where and the purpose for which they were used, that they should be screwed down to the floor. Further, the agreement under which these chairs were provided was not an ordinary hire-purchase agreement, and the case of *Hobson* v. *Gorringe* (1) and other decisions have generally been treated as proceeding on the ground that the agreements under which the chattels were supplied were hire-purchase agreements. It is no doubt true that the agreement in the present case, though an agreement for hire only, contained an option of purchase; but that option was never exercised. At the date of the mortgage the property in these chairs was the plaintiffs', and it never passed to Brammall, the mortgagor, who had only that special property in them which every hirer has in hired chattels; it is difficult, therefore, to understand how the legal ownership could have passed to the defendants by virtue of their mortgage. If the chairs had been brought upon the premises by a tenant or occupier after the date of the mortgage, it seems clear that they would not have passed to the defendants as mortgagees, and I see no stronger reason for their so passing in the facts of the present case. No doubt a chattel on being attached to the soil or to a building primâ facie becomes a fixture, but the presumption may be rebutted by shewing that the annexation is incomplete, so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete

(1) [1897] 1 Ch. 182.

1903

LYON & Co. v. LONDON CITY AND MIDLAND BANK.

Joyce J.

enjoyment and use of the chattel as a chattel. That seems to me to be what has been done in the present case. The mode of annexation of these chairs to the freehold is analogous rather to the mode in which a carpet is fastened to a floor than to the mode in which engines, boilers, and heavy machinery are affixed to the freehold, and moreover the purpose of the annexation is only temporary. In my opinion these chairs did not cease to be chattels on being screwed to the floor, and I hold that the property in them did not pass to the defendants.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Reed & Reed.*

Solicitors for defendants: *Nye, Moreton & Close, for J. K. Nye & Treacher, Brighton.*

W. J. B.

C. A.

1903

May 20.

[IN THE COURT OF APPEAL.]

COATES *v.* MOORE.

Bill of Sale—Copy filed on Registration—Omissions from Copy—Affidavit—Term for Maintenance of the Security—Covenant to replace worn-out Articles—Substituted Chattels, Assignment of—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43) *ss.* 4, 6, 9—*Liverpool Court of Passage—Interpleader Issue—New Trial—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict. c.* 37), *s.* 10.

An application lies to the Court of Appeal for a new trial of an interpleader issue tried in the Liverpool Court of Passage as in the case of any other issue there tried.

Where, a bill of sale in proper form having been duly executed and attested, the copy of it filed in pursuance of the Bills of Sale Act, 1878, s. 10, sub-s. 2, omitted the signature of the grantor, and the signature, address, and description of the attesting witness, but the affidavit filed with the copy stated that the bill of sale was duly executed by the grantor in the presence of the attesting witness, giving his name, address, and description:—

Held, that the bill of sale was valid, as the matters omitted in the copy of the bill of sale might be supplied by reference to the affidavit filed therewith.

Thomas v. *Roberts*, [1898] 1 Q. B. 657, followed.

By a bill of sale, given as a security for the payment of money, the

grantor assigned to the grantee the chattels and things specifically described in a schedule thereto, and also all chattels and things which might at any time during the continuance of the security be substituted for them or any of them. The bill of sale contained a covenant by the grantor that he would during the continuance of the security replace such of the chattels and things expressed to be assigned as should be worn out by other articles of value equal to the present value of the articles worn out, so as at all times to keep up the total value of the chattels and things comprised in the security to the present value:—

Held, that the bill of sale did not deviate from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, the assignment of substituted chattels and things only applying to chattels and things substituted under the covenant for the maintenance of the security.

Seed v. *Bradley*, [1894] 1 Q. B. 319, followed.

APPLICATION for judgment or a new trial by the defendant in an interpleader issue tried before the judge of the Passage Court at Liverpool with a jury.

Goods having been taken in execution upon a judgment obtained by the defendant against Joseph Taggart, the plaintiff claimed them under a bill of sale, and an interpleader order was made in the Passage Court for the trial of an issue, in order to determine the title to the goods. The only question in the issue was as to the validity of the bill of sale, the provisions of which, so far as material, were as follows: The bill of sale was made on September 20, 1898, between Joseph Taggart, who was therein called the mortgagor, of the one part, and the plaintiff, who was therein called the mortgagee, of the other part, and witnessed that the mortgagor, in consideration of the sum of 50*l.* advanced by the mortgagee as therein mentioned, did thereby "assign unto the mortgagee all and singular the several chattels and things specifically described in the schedule hereto annexed, and being in the premises situate and known as 8, Enid Street, Liverpool, aforesaid, and also all chattels and things which may at any time during the continuance of this security be substituted for them or any of them, to hold the same by way of security for payment in manner hereinafter appearing of the sum of 50*l.*" The bill of sale contained a covenant in the following terms: "And the mortgagor doth also agree with the mortgagee that he will not during the continuance of this security without

C. A. 1903

COATES v. MOORE.

the written consent of the mortgagee assign or underlet the said chattels and things expressed to be hereby assigned, or any of them, or remove the same or any of them except for necessary repairs, and will replace such of them as shall be worn out by other articles of value equal to the present value of the articles worn out, so as at all times to keep up the total value of the chattels and things comprised in this security to the present value."

The bill of sale was duly executed by the grantor, and attested, the address and description of the attesting witness being stated as required by the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; but in the copy filed on registration under the Bills of Sale Act, 1878, s. 10, sub-s. 2, the places for the signature of the grantor, and for the signature, address, and description of the attesting witness were left blank, the copy of the attestation clause being as follows: "Signed, sealed, and delivered by the said Joseph Taggart in the presence of——" An affidavit by the attesting witness was duly filed with the copy bill of sale. This affidavit was in correct form, and stated, among the other requisite particulars, that the bill of sale was made and given by the said Joseph Taggart on September 20, 1898, and that the attesting witness was present and saw him duly execute the bill of sale on that date, and gave the name, address, and description of the attesting witness. On the trial of the issue a verdict was entered for the plaintiff, subject to points of law reserved with regard to the validity of the bill of sale, and the learned judge of the Passage Court subsequently held that the bill of sale was good.

J. H. Pugh (*J. W. Ross Brown* with him), for the plaintiff, took a preliminary objection to the application. The Court has no jurisdiction to entertain this application. There is no right of appeal from the judgment on an interpleader issue in the Passage Court. Under s. 17 of the Common Law Procedure Act, 1860, there was no appeal from a judgment in an interpleader issue. Sect. 10 of the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), will be relied on by the

defendant as giving a right of appeal; but it is submitted that that section does not apply to interpleader issues. It was held in *Anderson* v. *Dean* (1) that that section applied to the trial of "issues" in the Passage Court within the meaning of the word "issues" as used in s. 45 of the Liverpool Court of Passage Procedure Act, 1853 (16 & 17 Vict. c. xxi.). It is submitted that an interpleader issue is not within the meaning of that section; interpleader issues are specially provided for by ss. 67, 68 of the Liverpool Court of Passage Procedure Act, 1853, and on the principle, "Generalia specialibus non derogant," s. 10 of the Act of 1893 ought not to be construed as applicable to them. Sect. 68 of the Act of 1853 provides with regard to interpleader proceedings that the judgment in any such action or issue as may be directed by the Court, and the decision of the Court in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

[MATHEW L.J. The intention of the Legislature in passing the Liverpool Court of Passage Act, 1893, seems to have been to assimilate the procedure in that Court to that in the High Court. Why should we limit the meaning of the term "issue" so as to exclude an interpleader issue?]

Assuming that s. 10 of the Liverpool Court of Passage Act, 1893, applies, that section only gives a right of appeal subject to the same rules, regulations, and provisions as are applicable to cases where an appeal would be allowed on a trial at nisi prius. Now, by Order LVII., r. 11, of the Rules of the Supreme Court, 1883, "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding . . . . shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal." Here no such leave has been obtained.

F. A. Greer, for the defendant, contra. It is submitted that s. 10 of the Act of 1893 clearly applies to an interpleader issue. The intention of the Legislature in passing that Act, as shewn by ss. 7 and 8, was to assimilate the procedure in the Passage

(1) [1894] 2 Q. B. 222.

C. A. 1903

COATES v. MOORE.

Court to that of the High Court. Sect. 68 of the Liverpool Court of Passage Procedure Act, 1853, is only analogous to the 17th section of the Common Law Procedure Act, 1860. There never has been any enactment or rule preventing an application for a new trial of an interpleader issue in the High Court. The provisions of Order LVII., r. 11, and those of s. 17 of the Common Law Procedure Act, 1860, have never been construed as barring such an application, or requiring leave before it can be made. The unsuccessful party is as much entitled to have a misdirection by the judge or a perverse verdict by a jury rectified in the case of a trial by a jury of an interpleader issue as in the case of the trial of any other issue: see *Robinson* v. *Tucker* (1) and *Dawson* v. *Fox* (2), which are really conclusive on this point. The final judgment under the interpleader order and the ruling of the judge for the purposes of the trial of the interpleader issue are distinct matters. Where the judge disposes of the merits of the claims summarily under Order LVII., r. 8, and, where, after the trial of an interpleader issue, he finally disposes of the whole matter of the interpleader proceedings under Order LVII., r. 13, there is no appeal from that judgment, except by leave under Order LVII., r. 11; but that rule has nothing to do with an application for a new trial of the issue on the ground of misdirection. There has not been in the present case any final judgment disposing of the interpleader proceedings; and, even if there had, it would not prevent an application for a new trial on the ground of misdirection by the judge on a point of law on the trial of the issue. The subject was fully discussed by Brett M.R. in *Robinson* v. *Tucker* (3), and the distinction between the trial of the issue and the final disposal of the whole matter of the interpleader proceedings was there explained.

COLLINS M.R. I think we can hear the application.

F. A. Greer, for the defendant. By s. 10, sub-s. 2, of the Bills of Sale Act, 1878, "A true copy of such bill, and of every such schedule or inventory, and of every attestation of the

(1) (1884) 14 Q. B. D. 371. (2) (1885) 14 Q. B. D. 377.
(3) 14 Q. B. D. 371, at pp. 374, 375.

execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale," is to be filed on registration of the bill of sale. Unless duly registered the bill of sale is void: see Bills of Sale Act, 1878, s. 8, and Bills of Sale Act (1878) Amendment Act, 1882, s. 8. The provisions of s. 10, sub-s. 2, were not in this case complied with, inasmuch as no true copy of the bill of sale or of the attestation of the execution thereof was filed, the signature of the grantor, and the signature, address, and description of the attesting witness being omitted. The object of the Legislature in requiring a copy of the bill of sale and attestation to be filed was that persons examining the register might be able to judge whether the bill of sale was valid or not. [He cited on this point *Parsons* v. *Brand* (1) and *Thomas* v. *Roberts*. (2)]

Secondly, this bill of sale was bad, because it included after-acquired property, and therefore was not in conformity with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882: *Thomas* v. *Kelly*. (3) It is true that in *Seed* v. *Bradley* (4) it was held that a covenant, by which the grantor of a bill of sale agreed to replace articles specifically assigned which might become damaged or worn out, did not invalidate the bill of sale, because it was a covenant for maintenance of the security. But in this case the provisions of the bill of sale with regard to substituted articles go beyond what is necessary for the maintenance of the security; for the assignment includes any goods which may by agreement between the parties be substituted for the articles described in the schedule, and not merely goods substituted under the covenant for articles mentioned in the schedule which may become worn out. The case therefore comes within the decision of the House of Lords in *Thomas* v. *Kelly*. (3) [He also cited on this point *Hadden, Best & Co.* v. *Oppenheim*. (5)]

(1) (1890) 25 Q. B. D. 110.
(2) [1898] 1 Q. B. 657.
(3) (1888) 13 App. Cas. 506.
(4) [1894] 1 Q. B. 319.
(5) (1889) 60 L. T. 962.

C. A. 1903

COATES v. MOORE.

J. H. Pugh, and *J. W. Ross Brown*, for the plaintiff, were not called upon.

COLLINS M.R. I think that both the objections to the bill of sale fail. The first objection is that, in the copy of the bill of sale, which has to be filed under s. 10, sub-s. 2, of the Bills of Sale Act, 1878, the places for the signature of the grantor, and the signature, address, and description of the attesting witness are left blank; and that, there being these blanks left in the copy, there has been no sufficient compliance with the requirements of the Act. A point similar to this in principle was taken, and decided adversely to the appellant's contention, in *Thomas* v. *Roberts*. (1) It was held in that case that a bill of sale was not necessarily void, because the copy filed omitted the date of the bill of sale, which was truly stated in the original bill of sale, and that the affidavit filed with the copy might be looked at to supply the omission. In the case with which we are now dealing, the matters omitted in the copy are contained in the original bill of sale, and also in the affidavit filed under the section. I can see no distinction in principle between the date and the matters omitted in this case. They are equally essential in the bill of sale, and I think can equally well be supplied by the affidavit.

The second point taken is that the bill of sale is void, because it comprises after-acquired property; and that it cannot be supported in this respect as merely providing for the maintenance of the security. The form in the schedule to the Act of 1882 permits the insertion of terms agreed upon for the maintenance of the security; and it was held in *Seed* v. *Bradley* (2) that, if the provisions of the bill of sale with regard to substituted chattels only cover chattels substituted for the maintenance of the security, the bill of sale is perfectly good. The judgment of Kay L.J. in that case deals with the matter very clearly. In discussing the case of *Thomas* v. *Kelly* (3), he points out that in that case the bill of sale contained a provision which went beyond anything that could be said to be merely for the main-

(1) [1898] 1 Q. B. 657. (2) [1894] 1 Q. B. 319.
(3) 13 App. Cas. 506.

tenance of the security, inasmuch as the assignment there was of all chattels brought on the premises "in substitution for or renewal of, or in addition to" the scheduled chattels; and he refers to the judgment of Lord Halsbury in *Thomas* v. *Kelly* (1) as indicating that, if a bill of sale only comprised chattels substituted for the chattels specifically described in the schedule by way of maintenance of the security, it would not be bad. I think the decision in *Seed* v. *Bradley* (2) covers this case, because in my opinion the terms of the assignment in this bill of sale only contemplate such chattels as may be substituted for the chattels specifically described in the schedule under the covenant for the maintenance of the security. For these reasons I think that the appeal must be dismissed.

STIRLING L.J. I agree. I also think that this case is covered by the authorities referred to by the Master of the Rolls.

MATHEW L.J. I see no reason to differ from the authorities which support the plaintiff's contention.

Appeal dismissed.

Solicitors for plaintiff: *Ledgard, Street & Co., for Cecil B. Taylor, Liverpool.*

Solicitors for defendant: *Sharpe, Parkers & Co., for Richardson & Marsh, Liverpool.*

(1) 13 App. Cas. 506. (2) [1894] 1 Q. B. 319.

E. L.

C. A.
1903
May 28.

[IN THE COURT OF APPEAL.]

PREIST *v.* LAST.

Sale of Goods—Implied Warranty—Fitness for particular Purpose—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 1.

The particular purpose for which an article purchased is required may, under the Sale of Goods Act, 1893, s. 14, be made known to the seller by the recognised description by which the article is purchased.

The question whether, on a sale of goods, the buyer made known to the seller the purpose for which the goods were required so as to shew that he relied on the seller's skill or judgment is one of fact depending on the circumstances of the particular case.

The plaintiff, a draper, went to the shop of the defendant, a retail chemist, and asked for a "hot-water bottle." An article was shewn to him as such. He inquired whether it would stand boiling water, and the defendant told him that it was meant for hot water, but would not stand boiling water. He then purchased it. Some days afterwards the bottle, while in use by the plaintiff's wife, burst, and she was in consequence scalded. The plaintiff sued the defendant as for breach of a warranty that the bottle was fit for use as a hot-water bottle. The jury found at the trial that it was not, when sold, fit for that purpose, and that this was the cause of its bursting. The judge, to whom power was given by consent to draw any inferences of fact, if necessary, on further consideration, found that the plaintiff had, when purchasing the bottle, made known to the defendant the particular purpose for which it was required, so as to shew that he relied on the skill and knowledge of the defendant; and held that the case therefore came within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and there was, consequently, an implied warranty that the bottle was fit for the purpose of holding hot water, of which there had been a breach. He therefore gave judgment for the plaintiff:—

Held, that the facts justified the conclusion arrived at by the judge.

APPLICATION by the defendant for judgment or a new trial in an action tried before Walton J. with a jury.

The action was for breach of an implied warranty that a hot-water bottle sold by the defendant to the plaintiff was reasonably fit for the purpose for which it was sold. (1)

It appeared that the plaintiff, who was a draper, requiring a hot-water bottle for use by his wife for the relief of cramp,

(1) There was an alternative claim for breach of an express warranty that the bottle was fit to hold boiling water, but the jury negatived the existence of such a warranty.

went to the shop of the defendant, who was a retail chemist, and asked for a hot-water bottle. The defendant shewed him an article as such, which he examined. The defendant's evidence in substance was that the plaintiff, when asking for the bottle, said that he did not want an expensive article; that he wanted it for a special case (without specifying it); and he asked whether the article shewn him would stand boiling water; and that he, the defendant, replied that it was meant for hot water, but would not stand boiling water. The plaintiff purchased the article, the price of which was 3*s.* 6*d.*, and it was used by his wife for four or five days, when it burst, while in use by her, and she was in consequence scalded. The plaintiff sued to recover expenses incurred in the treatment of his wife for the injury so occasioned to her.

The bottle, which appeared to be made of india-rubber, was of American make, and the defendant did not know anything about the composition of the material of which it was made. Evidence was given at the trial with regard to the composition of the material. The jury found, in answer to questions put to them by the learned judge, that the defendant did not tell the plaintiff that the bottle was fit for use with boiling water, that the bottle when sold was not fit for use as a hot-water bottle, and that this was the cause of its bursting; and they assessed the damages at 40*l.*

It appeared to have been agreed that, in dealing with the case upon the findings of the jury on further consideration, the learned judge should have power to draw further inferences of fact, if necessary.

The learned judge subsequently gave a judgment which was, in substance, to the following effect, namely, that the case came within s. 14, sub-s. 1, of the Sale of Goods Act, 1893; that the plaintiff, the buyer, had made known to the defendant, the seller, the particular purpose for which the article sold was required, namely, holding hot water, so as to shew that the buyer relied on the seller's skill and judgment, and the article was of a description which it was in the course of the seller's business to supply; that there was therefore an implied condition that the article should be reasonably fit for the purpose

C. A. 1903

PREIST v. LAST.

of holding hot water; and that, the jury having found that it was not fit for that purpose, when sold, there was breach of that implied condition; and he therefore gave judgment for the plaintiff for 40*l.*, the damages found by the jury.

Horridge, K.C., and *A. P. Thomas*, for the defendant. In order to bring a case within the Sale of Goods Act, 1893, s. 14, sub-s. 1, the particular purpose for which the goods are required must be made known by the buyer to the seller, and the circumstances must be such as to shew that the buyer relied on the skill or judgment of the seller. Upon the facts of the present case neither of those requirements is fulfilled. It is submitted that the sub-section was not intended to alter the law, as it existed before the passing of the Sale of Goods Act, 1893, but merely to express the result of the previous decisions in which it was held that, where goods were purchased for a special purpose particularized by the buyer upon making the purchase, there was an implied warranty that the goods were reasonably fit for that purpose. The circumstances of this case do not bring it within any of those decisions. According to the law, as it existed previously to the Act, there was no implied warranty of quality in a case like this, i.e., where a specific chattel is sold over the counter of a shop to a person who has an opportunity of examining the article sold. Nothing turns in such cases as this on the fact that the purchaser has no special knowledge, or competency to judge, of the article sold. The case of a sale of unascertained goods, or where the vendor is the manufacturer, involves different considerations. Goods sold by a description must no doubt answer that description, in the sense that they must be merchantable under it; but so long as they do that, there is no breach of contract, in the absence of any further warranty express or implied. The fact that goods sold are not fit for some particular purpose does not constitute a breach of an implied warranty, unless it is really, either expressly or by necessary implication, a term of the contract of sale that they should be fit for that purpose. There was no such specification of a particular purpose upon the purchase of the hot-water

bottle in this case as to bring it within the cases in which, before the Sale of Goods Act, 1893, a warranty that goods sold were fit for a particular purpose was implied. The term "hot-water bottle" is really a mere trade description of the article, the name by which such articles are known; and the use of it does not involve a communication that the article was required for any particular purpose, such as the application of heat to the human body for the relief of pain. Hot-water bottles are used for many purposes. The article sold was a "hot-water bottle," though made of inferior materials, and it was used as a hot-water bottle for five days. In all the cases in which a warranty of this kind has been implied, such as *Jones* v. *Bright* (1), *Brown* v. *Edgington* (2), and *Shepherd* v. *Pybus* (3), it will be found that there was some distinct communication of the particular purpose for which the article was purchased, beyond what might be implied from the mere name of the article, or the description by which an article had become generally known. For example, in *Jones* v. *Bright* (1) the copper was purchased for the express purpose of sheathing the plaintiff's ship. There was really no evidence here to shew that the plaintiff relied on the skill or judgment of the defendant. The defendant was not, and could not have been supposed to be, the manufacturer of the article. He was a retail chemist, and there was no reason why he should be presumed to know more about india-rubber goods than a draper. It is not like a case where the vendors are manufacturers, or large wholesale merchants of a particular kind of goods, in which case a purchaser might presume that they had special knowledge with regard to the article sold. It would involve a very serious extension of the liability of small retail shopkeepers, who sell a number of miscellaneous articles of which they are not manufacturers, if, under such circumstances as these, it is held that there is an implied warranty of the quality of the article sold.

[They also cited *Jones* v. *Just* (4); *Bluett* v. *Osborne* (5);

(1) (1829) 5 Bing. 533; 30 R. R. 728.
(2) (1841) 2 Man. & G. 279; 58 R. R. 408.
(3) (1842) 3 Man. & G. 868.
(4) (1868) L. R. 3 Q. B. 197.
(5) (1816) 1 Stark. 384; 18 R. R. 785.

C. A. 1903

PREIST v. LAST.

Parkinson v. *Lee* (1); *Randall* v. *Newson* (2); *Gray* v. *Cox* (3); *Laing* v. *Fidgeon* (4); *Gardiner* v. *Gray* (5); *Emmerton* v. *Mathews* (6); *Mody* v. *Gregson* (7); *Beer* v. *Walker* (8); *Ward* v. *Hobbs* (9); *Burnby* v. *Bollett* (10); *Smith* v. *Baker*. (11)]

W. F. K. Taylor, K.C., and *F. A. Greer*, for the plaintiff, were not called upon to argue.

COLLINS M.R. I entirely agree with the judgment of Walton J., and the reasons which he gave for it; but, in deference to the argument which has been addressed to us, I will state my view of the case in order to shew that the argument has been appreciated. The action in this case is by the purchaser of a hot-water bottle against the vendor for damages for the breach of an implied warranty that the article sold was fit for the purpose for which it was sold, or, in other words, for failure by the defendant to perform the contract of sale which he made. The jury have found that the bottle in question, when sold, was not fit for use as a hot-water bottle, and that this was the cause of its bursting. The plaintiff, who was a draper, and had no special skill or knowledge with regard to hot-water bottles, went to the shop of the defendant, who was a chemist, and who sold such articles, and asked him for a "hot-water bottle"; and the judge has inferred that the article was bought by the plaintiff, and sold by the defendant, for the specific purpose of being used as a hot-water bottle. The argument addressed to us with reference to the terms of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, was that, the sub-section requiring that the particular purpose for which the article is purchased should be made known to the seller, this can only be done by something beyond what is contained in the recognised description of the article itself. The words of

(1) (1802) 2 East, 314; 6 R. R. 429.
(2) (1877) 2 Q. B. D. 102.
(3) (1824-5) 4 B. & C. 108; 28 R. R. 769.
(4) (1815) 6 Taunt. 108; 16 R. R. 589.
(5) (1815) 4 Camp. 144; 16 R. R. 764.
(6) (1862) 7 H. & N. 586.
(7) (1868) L. R. 4 Ex. 49.
(8) (1877) 46 L. J. (Q.B.) 677.
(9) (1877) 2 Q. B. D. 331; 3 Q. B. D. 150; (1878) 4 App. Cas. 13.
(10) (1847) 16 M. & W. 644.
(11) (1878) 40 L. T. 261.

the sub-section are as follows: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose (provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose)." The argument appears to be that the purpose for which this article was sold was merely the ordinary purpose of use as a hot-water bottle, and, that being its ordinary purpose, the case is not brought within the words "makes known to the seller the particular purpose for which the goods are required." I do not think that this contention is sound. I think that, regard being had to the state of the law as it existed previously to the passing of the Act, the object with which those words were introduced is clear. There are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of general use for a multitude of purposes. In the case of a purchase of goods of that kind, in order to give rise to the implication of a warranty, it is necessary to shew that, though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose. But in a case where the discussion begins with the fact that the description of the goods, by which they were sold, points to one particular purpose only, it seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller. The fact that, by the very terms of the sale itself, the article sold purports to be for use for a particular purpose cannot possibly exclude the case from the rule that, where goods are sold for a particular purpose, there is an implied warranty that they are reasonably fit for that purpose. The sale is of goods which, by the very description under which they are sold, appear to be sold for a particular purpose. The

C. A. 1903

PREIST v. LAST.

Collins M.R.

learned judge had in the present case power to draw inferences of fact, and it appears to me that he has drawn the inference which necessarily arises in this case from the nature of the transaction itself. A draper, who is unskilled in the matter of hot-water bottles, goes to the shop of a person who makes it part of his business to supply such bottles, and asks for a "hot-water bottle"; and an article is supplied to him as such. It seems to me that the transaction amounts to a contract to supply him with an article reasonably fit for use as a hot-water bottle under any circumstances in which such bottles are usually applicable, including the purpose of applying heat to any part of the human body. In the circumstances of this case, I think there was evidence which justified the learned judge in finding that there was a purchase of a specific chattel for a particular purpose under circumstances which shewed that the buyer relied upon the skill or judgment of the seller. The inference is one of fact which must depend on all the circumstances of the case: and it cannot, in my opinion, be excluded, as suggested, by the fact that the article was generally known, and was sold, by a name which indicated the purpose for which it was required. I think the judgment of Walton J. was quite correct. The learned judge in giving judgment confined himself to dealing with the terms of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, without reference to the question whether that sub-section did or did not alter the law on the subject. Speaking for myself, I regard that sub-section as merely expressing the law as it existed at the time of the passing of the Act. For these reasons I think the application must be dismissed.

STIRLING L.J. I am of the same opinion. I think that the question with which we have to deal in this case is ultimately one of fact, and that the findings of the jury together with the inferences of the judge on questions of fact really decide the case. The jury have found that the bottle, when sold, was not fit for use as a hot-water bottle, and that this was the cause of its bursting. The judge has found as a fact that the plaintiff, who had no special knowledge on the subject of hot-water

bottles, did convey to the mind of the defendant, part of whose business it was to sell such bottles, that the article was required for a particular purpose, namely, for use as a hot-water bottle, in such a way as to shew that he relied on the skill and judgment of the seller. I have looked at the judge's note of the evidence, and the defendant's own account of the transaction is that the plaintiff asked for a hot-water bottle; that he said that he wanted it for a special purpose, and asked whether it would stand boiling water; and that he, the defendant, said that it was meant for hot water, but that it would not stand boiling water. There was, therefore, as it appears to me, in the evidence of the defendant himself, ample ground for the conclusion that it was made known to the defendant that the article sold was required for the particular purpose of holding hot water, and that the case came within the terms of s. 14, sub-s. 1, of the Sale of Goods Act, 1893.

MATHEW L.J. I am of the same opinion, and do not desire to add anything to what the Master of the Rolls and my brother Stirling have said.

Application dismissed.

Solicitors for plaintiff: *Maples, Teesdale & Co., for Oppenheim & Malkin, St. Helen's and Liverpool.*

Solicitors for defendant: *Cartwright & Cunningham, for Donnison & Edwards, Liverpool.*

E. L.

C. A.
1903
May 18.

[IN THE COURT OF APPEAL.]

In re JAMES BRIGGS & SON.

Practice—Mayor's Court—Taxation of Costs—Solicitor and Client—Amount recovered under 50*l.—Certificate by Judge for Costs on Higher Scale—Rule* 13 *of the Mayor's Court Rules*, 1890.

Where, in an action in the Mayor's Court for 40*l.*, the plaintiff succeeded, and the judge, under rule 13 of the Mayor's Court Rules, 1890, certified for costs on the Mayor's Court scale applicable to cases in which an amount of or exceeding 50*l.* has been recovered:—

Held, that, upon taxation of the bill delivered by the defendants' solicitors in respect of their costs in the action as between them and the defendants under the Solicitors Act, 1843, the master was right in taxing upon the same scale.

APPEAL from the refusal of Phillimore J. at chambers to order a review of taxation.

An action having been brought against the appellants in the Mayor's Court for the sum of 40*l.*, they employed the respondents, James Briggs & Son, as their solicitors in the action. The plaintiff succeeded in the action, and the Recorder, who tried the case, made an order under rule 13 of the Mayor's Court Rules, 1890, awarding costs to the plaintiff on the scale applicable in the Mayor's Court to cases in which an amount of or exceeding 50*l.* has been recovered. But for this order the plaintiff's costs would have been taxed on the scale applicable in the Mayor's Court to actions in which a sum of or exceeding 20*l.*, but under 50*l.*, has been recovered. (1) The respondents delivered to the appellants a bill of costs which included their costs and charges in the Mayor's Court action as well as their costs and charges in respect of certain conveyancing and other matters, in which they had acted as solicitors for the appellants. The appellants obtained the common order for taxation of the bill under s. 37 of the Solicitors Act, 1843. The taxing master taxed the costs relating to the action in the

(1) By the Mayor's Court Rules, 1890, the scale applicable in the case of a successful plaintiff depends on the amount recovered, while that applicable in the case of a successful defendant depends on the amount claimed: see rule 14 of Mayor's Court Rules, 1890.

Mayor's Court upon the scale applicable to cases where an amount of or exceeding 50*l.* has been recovered. The appellants took objection to the taxation on the ground that, the amount claimed being under 50*l.*, the taxation should have been on the scale applicable to cases where an amount of or exceeding 20*l.*, but under 50*l.*, has been claimed. On application to Phillimore J. at chambers he affirmed the decision of the master, and refused to order a review of taxation. (1)

J. B. Matthews, for the appellants. The master had no power to tax the costs of the action in the Mayor's Court as between the appellants, the unsuccessful defendants in that action, and their solicitors on the higher scale applicable to actions for amounts of and exceeding 50*l.* Rule 1 of the Mayor's Court Rules, 1890, provides that in every action in the Mayor's Court the costs shall be taxed according to the scales in the schedule to the rules, subject to the review of such taxation by one of the judges of that Court. The power of certifying for costs on the higher scale given by rule 13 of the Mayor's Court Rules, 1890, only affects the taxation of party and party costs as between the successful party and his solicitor on the one hand, and the unsuccessful party on the other. It has nothing to do with the scale of costs applicable as between the unsuccessful party and his solicitor. In the case of *In re Langlois and Biden* (2) Lord Esher M.R. expressed an opinion that s. 119 of the County Courts Act, 1888, which is in nearly the same terms as rule 13 of the Mayor's Court Rules, 1890, applied only to a taxation between party and party. Inasmuch as the scale of costs applicable in the case of defendants is governed by the amount claimed in the action, the defendant's solicitor must be taken to contract with his client on the terms

(1) By rule 13 of the Mayor's Court Rules, 1890, it is provided that "It shall be in the power of a judge of the Court to award costs on a higher scale to the plaintiff on any amount recovered, however small, or to the defendant who successfully defends an action brought for any amount, however small, provided the said judge certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest."

(2) [1891] 1 Q. B. 349.

C. A. 1903

JAMES BRIGGS & SON, *In re.*

that his remuneration shall be regulated by that scale, and the client to contemplate that the amounts which may become payable by him to his solicitor will not exceed those specified by that scale. It is submitted that the fact that, on certain grounds mentioned in rule 13, an order may be made giving the successful plaintiff costs as between party and party on a higher scale is no reason why the remuneration to the defendant's solicitor should be increased beyond that contemplated upon his retainer. It does not follow that the considerations with reference to which the judge may make the higher scale applicable in favour of the successful party as against the unsuccessful party have any application as between the latter and his solicitor. The case, for instance, may be of great importance to one party as representing a class, but not to the other.

[COLLINS M.R. The decision in *In re Langlois and Biden* (1) seems to be against the contention of the appellants in the present case; for it was there held that the taxing officer had a discretion to allow a larger amount of costs as between solicitor and client than the amount prescribed by the scale as between party and party.]

The ground of that decision was that, under the circumstances of that case, the justice of the case absolutely required that the master should have such a discretion. There the taxation was as between a plaintiff and his solicitors in a case in which the plaintiff, having recovered less than 10*l.* in an action for 15*l.* in a county court, was only entitled as between party and party to costs on the lower scale. The amount of court fees payable and other disbursements, which the solicitor may have to make, depend in the county court on the amount for which the action is brought, and it would be a gross injustice that a solicitor, who may have been misled by his client's statements with regard to the amount for which the action should be brought, should not be able to recover sums disbursed by him, because they would not be recoverable under the scale as between party and party. In that case, the plaintiff claiming 15*l.*, the inference would be that he and his solicitors

(1) [1891] 1 Q. B. 349.

contemplated that the solicitors' costs should be regulated by the scale which would be applicable if that amount was recovered. The same considerations are not applicable to the case of a defendant. Rule 10 of the Rules of the Supreme Court, January, 1902, is only applicable to taxation of costs in High Court actions and matters.

Hohler, for the respondents. It is submitted that the scales given by the Mayor's Court Rules, 1890, are not scales for taxation of costs as between solicitor and client, and there is no procedure by means of which the appellants could have got these costs taxed in that Court. It would appear from the books upon Mayor's Court practice that, if the respondents had sued in the Mayor's Court to recover these costs, there might have been a taxation of the bill by the registrar of the Mayor's Court to ascertain the amount for which judgment should be given for them. But these costs could only be taxed at the instance of the appellants under the Solicitors Act, 1843, in the High Court. Therefore rule 10 of the Rules of the Supreme Court, January, 1902, by which a new regulation applicable to every taxation is substituted for the old regulation 29 of Order LXV., r. 27, is applicable. The scales of costs contained in the schedule to the Mayor's Court Rules appear to be scales of party and party costs, only applicable in that Court as between the parties—that is to say, as between the successful party and his solicitor on the one hand, and the unsuccessful party on the other. It is submitted that, though a master might probably in his discretion have regard to those scales in taxing as between solicitor and client, they are not strictly speaking binding upon him, and, if in his discretion he sees good reason for allowing costs on a higher scale, he has power to do so. If in such a case as this the master had no discretion, but was absolutely bound by the lower scale in taxations as between solicitor and client, great injustice might be done to a solicitor. It may often happen that a case is of the greatest importance to particular persons or a class of persons, though the amount for which the action is brought may be very small, as in the case of an action for a toll or dock dues. If the Mayor's Court scales apply to taxation as

C. A. 1903

JAMES BRIGGS & SON, *In re.*

between solicitor and client, then it is submitted that the effect of a certificate under rule 13 is to take the case for all purposes out of the lower scale. Generally speaking, where, in the opinion of the judge, the difficulty and importance of the case justify an order under rule 13, the case would be one which would require care and skill on the part of the solicitor for the unsuccessful party beyond what the amount sued for might indicate. The scales in the schedule to the Mayor's Court Rules are not exhaustive: see *Hall* v. *Launspach* (1), where it was held that in cases not specifically provided for by the scales the Mayor's Court has an inherent jurisdiction to order costs. It is submitted that either the rules of the Mayor's Court with regard to the scales of costs should be construed as meaning that, if the judge certifies under rule 13, the action is taken for all purposes out of the lower into the higher scale, or else that the case is casus omissus, not provided for by the rules, and therefore one in which the master may exercise his discretion.

J. B. Matthews, for the appellants, in reply.

COLLINS M.R. This is an appeal from an order of Phillimore J. affirming the decision of the master upon the taxation of a bill of costs. The taxation in question was of costs of an action in the Mayor's Court as between the appellants, who were the defendants in that action, and their solicitors. Upon the trial of the action in the Mayor's Court the defendants were unsuccessful, and the judge ordered, as he had power to do under rule 13 of the Mayor's Court Rules, 1890, that costs should be payable by the defendants to the plaintiff upon the scale applicable in the Mayor's Court to actions in which a sum of or exceeding 50*l.* has been recovered. The order so made by the judge indicates what his opinion was as to the nature and difficulty of the case, and the scale reasonably applicable to the costs of it. The appellants' solicitors subsequently sent in their bill of costs, of which the costs of the action in the Mayor's Court formed only a part. The appellants demanded taxation of that bill, and it was accordingly taxed by a master

(1) [1898] 1 Q. B. 513.

of the High Court, who, in view of the nature of the case and the certificate given by the judge, taxed the costs of the action in the Mayor's Court as between the appellants and their solicitors upon the scale applicable to cases in which an amount of or exceeding 50*l.* has been claimed or recovered, as the case might be. Against that taxation the appellants appeal on the ground that the scale applied by the master was not applicable. They say that by the Mayor's Court Rules the scale upon which the costs are to be taxed as between an unsuccessful defendant and his solicitor is regulated by the amount claimed in the action, and that they ought not to lose the advantage of the fact that the amount claimed in this action was under 50*l.* by reason of the judge's having made an order in favour of the plaintiff certifying that the case was one of greater importance than was primâ facie indicated by the amount claimed. The fact of the judge's certifying in the terms of rule 13 that an action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest, appears to me to indicate that the case in which that certificate is given is not one in which the scale of costs ought to be measured by reference to the amount claimed; and I think that the effect of such a certificate is to take the whole case out of the lower scale, and justify every one who has to deal with the case afterwards in treating it as one which is not to be regulated by the amount claimed, but as having such importance that it is brought within the class of cases to which the higher scale applies. Therefore, when a master comes to tax the costs, I think that he must be entitled to treat the case as having for all purposes become one in which the scale applicable is that which applies to cases where an amount of or exceeding 50*l.* has been claimed or recovered, unless there is something in the rules distinctly limiting the taxation in such a case by reference to the amount claimed or recovered, and prohibiting him from applying the higher scale. The counsel for the appellants was unable really to point to anything in the Mayor's Court Rules prohibiting the master in such a case from treating the case as if it had originally been what by virtue of the

C. A. 1903

JAMES BRIGGS & SON, *In re.*

Collins M.R.

judge's order it has become, namely, a case to which the higher scale is applicable. The only rule to which the appellants' counsel could point as having that effect was rule 1 of the Mayor's Court Rules, 1890, which provides that "in every action or matter in the Mayor's Court all costs shall be taxed by the registrar of such Court according to the scales of fees and costs set out in the schedules hereto annexed, subject to the review of such taxation by one of the judges of the Court." But in the very system of rules of which that rule forms a part is included rule 13, by which power is given to a judge of the Court to lift a case out of one scale of costs into another. It appears to me that it is only giving effect to the scheme of the rules to treat an order under rule 13 as lifting a case for all purposes out of the lower scale into that in which the higher standard of taxation is applicable. For these reasons I think that the appeal must be dismissed.

MATHEW L.J. I am of the same opinion. I think that the effect of the order made by the judge under rule 13 of the Mayor's Court Rules, 1890, is to raise the case in which it was made into the class of cases in which an amount of or exceeding 50*l.* has been claimed or recovered. It appears to me that the grounds upon which the judge may make an order under rule 13 as between party and party are grounds which also render it just that the effect of that order should be extended to the taxation of costs as between solicitor and client; because, where they exist, presumably the case will give more trouble, and require more skill on the part of the solicitor than is indicated merely by the amount claimed.

Appeal dismissed.

Solicitor for appellants: *Owen B. Thomas.*
Solicitors for respondents: *James Briggs & Son.*

E. L.

McQUEEN *v.* JACKSON.

1903
May 27.

Sale of Food and Drugs—Practice—Time for Return of Summons—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2.

By s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, it is provided that "In any prosecution under the Sale of Food and Drugs Acts the summons . . . . shall not be made returnable in less time than fourteen days from the day on which it is served":—

Held, that fourteen clear days must elapse between the date of service and that of return.

CASE stated by justices of Lancashire.

On November 26, 1902, an information was laid by the appellant against the respondent under s. 6 of the Sale of Food and Drugs Act, 1875, for selling milk not being of the substance, nature, and quality demanded by the purchaser. And on the same date a second information was laid against the respondent under s. 11 of the Sale of Food and Drugs Act, 1899, for selling skimmed milk from a tin which did not bear a label as required by that section. Upon the same day, November 26, both the summonses were served upon the respondent. They were made returnable on December 10. At the hearing before the justices objection was taken on behalf of the respondent that the summonses had been made returnable in less time than fourteen days from the day of service. The justices upheld the objection and dismissed the information.

W. Mackenzie, for the appellant.

Woodcock, for the respondent.

LORD ALVERSTONE C.J. The section which we are called upon to construe provides that "In any prosecution under the Sale of Food and Drugs Acts the summons . . . . shall not be made returnable in less time than fourteen days from the day on which it is served." In my opinion that points to the same period of time as would have been indicated if the words used had been "fourteen clear days." I think it was intended that fourteen whole days should elapse between

1903

McQUEEN v. JACKSON.

the day of the service of the summons and the day of the return. The summons was, therefore, made returnable too soon. The appeal must be dismissed.

CHANNELL J. I agree.

Appeal dismissed.

Solicitors for appellant: *Snow, Fox & Higginson, for Harcourt E. Clare, Preston.*

Solicitors for respondent: *White & Leonard, for Hartley & Son, Rochdale.*

J. F. C.

1902
March 24.
1903
April 27.

In re GORDON.
In re SALMOND.

Bankruptcy—Arrest of Debtor—Bond to enforce Debtor's Attendance for Examination—Default of Debtor—Forfeiture of Bond—Whether Crown or Creditors entitled to Proceeds of Bond—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 25—*Form of Bond.*

Where a debtor, who has been arrested under s. 25 of the Bankruptcy Act, 1883, for failing to attend his examination, gives a bond with sureties to obtain his release from prison, the proceeds of the bond, if it is subsequently forfeited, will go as a general rule, not to the Crown, but to the creditors, subject to any order the Court may make in any special case.

In future the bond is to be given to the senior registrar in bankruptcy for the time being.

IN each of these cases the question raised was, who were entitled to the proceeds of the bond given by the debtor and his surety upon the debtor's release from custody under s. 25 of the Bankruptcy Act, 1883.

Neither the Act nor the rules thereunder prescribe the form of bond to be given by a debtor and his surety under s. 25 as security for the debtor's attendance for examination, and prior to December, 1899, all bonds given by a debtor and his surety under the section were made in favour of the Crown, and when the bonds were estreated the proceeds went to the Crown. But since December, 1899, a practice had arisen of making these bonds in favour of the official receiver, and orders had been made whereby the money paid under the

bonds, when estreated, went, not to the Crown, but to the estate of the debtor.

In re GORDON.

In this case the bankrupt did not attend for his public examination, and on August 28, 1901, he was arrested on a warrant issued under s. 25, and lodged in gaol. On September 3, 1901, he was liberated on giving a bond with a surety to secure his attendance for examination. The bond was made in favour of Mr. Chapman, "the official receiver and trustee of the property of the said bankrupt," in the sum of 50*l.*, to be forfeited as therein provided. The bankrupt again made default, and on November 16, 1901, an order was made declaring the bond forfeited, and the surety was ordered to pay the 50*l.* to Mr. Chapman, "the official receiver and trustee." Notice was given to the Treasury, who claimed the 50*l.* on behalf of the Crown, and applied to the Court for an order to that effect.

H. Sutton, for the Treasury.
Muir Mackenzie, for the official receiver.

1902. March 24. WRIGHT J. I think the bond ought to have been given to the Crown, but I will deal with this particular case, which is not of very great importance, without reference to any other case that may come before me. In this case I do not see my way to give effect to anything except the language of the bond, which, as it stands, give the bankrupt's estate the benefit of the bond. As regards the future, I certainly think the bond ought to be given either to the Crown or to the Board of Trade. I think those two authorities should consider the form of bond to be given, and the disposition of the money when a bond is estreated, and I should like to be informed whether they agree. If they agree, I will then settle the form of bond, which no doubt will be followed by the registrars in the future. The matter can be mentioned at any time.

In re SALMOND.

In this case also the bankrupt did not attend for public

1903

GORDON, *In re.* SALMOND, *In re.*

examination, and was arrested and lodged in goal, and on January 29, 1900, he was released on giving a bond with a surety to the official receiver in the sum of 1000*l.* to secure the bankrupt's attendance upon his public examination. The bankrupt made default, and on April 24, 1902, an order was made declaring the bond forfeited, "to the extent and so far as was necessary for the purpose of administration and payment of a dividend to the creditors in bankruptcy," and the surety was ordered to pay 300*l.* on account. This sum was paid, and on May 13, 1902, the official receiver was ordered to place the 300*l.* to the credit of the estate after twenty-one days. Notice of this order was given to the Treasury, and they, on June 2, served the official receiver and the petitioning creditors with a notice of motion claiming the 300*l.* on behalf of the Crown. By arrangement the motion stood over to enable the Treasury to obtain the opinion of the law officers of the Crown—(*a*) as to the form in which and the persons to whom bonds to secure a debtor's attendance upon the official receiver and for public examination should in future be given upon his release from custody after arrest under s. 25 of the Bankruptcy Act, 1883; and (*b*) as to whether the proceeds of such bonds when estreated were the property of the Crown, or could be properly applied in the bankruptcy as part of the debtor's estate. Eventually the Treasury withdrew their claim to the 300*l.*, and their motion now came on, pro formâ, for dismissal. A form of bond to be given in future in cases under s. 25 had been settled and agreed between the law officers and the Board of Trade. The form provided that the bond should be given to the senior registrar in bankruptcy for the time being.

Muir Mackenzie, for the official receiver and the Board of Trade, mentioned the two cases, and submitted for the approval of the Court the form of bond that had been agreed, and asked for directions as to the future destination of any money payable under such bonds, when estreated.

Danckwerts, *K.C.*, and *E. J. Griffith*, for the petitioning creditors, asked for their costs of appearance.

1903

GORDON, *In re.*
SALMOND, *In re.*

1903. April 27. WRIGHT J. As the authorities are agreed, let the bond (1) be in the form recommended by the law officers. If the bond is put in suit, the money will go to the senior registrar in bankruptcy for the time being, and he will deal with it in his judicial capacity on the merits of each case. In any exceptional case he may refer to the judge as to the application of the money; but in the ordinary course the money will go to the bankrupt's estate. The motion is dismissed without costs.

Solicitors: *Solicitors to the Treasury; Solicitor to the Board of Trade*; *Adams & Adams*; *Edwards & Cohen.*

(1) The following is the form of bond agreed between the Treasury and the Board of Trade:—

"*In re* 'A.'
Ex parte THE DEBTOR.

KNOW all men by these presents that we, B. C. of ——— and D. E. of ———, are jointly and severally held and bound to———, of Bankruptcy Buildings, Carey Street, London, Senior Registrar in Bankruptcy, in the sum of £———, to be paid to the said ———, or the senior registrar in bankruptcy for the time being. For which payment to be made we bind ourselves and each of us for the whole our and each of our heirs, executors, and administrators jointly and severally and firmly by these presents.

WHEREAS the said A. has been arrested under a warrant of the High Court of Justice in Bankruptcy, and he has offered and undertakes to attend and submit himself [*or* herself] for examination on the date to be appointed for the purpose, and any adjournment, and to wait at such times on the official receiver as he may require for the purpose of performing the duties imposed upon him [*or* her] by the Bankruptcy Act, 1883 and 1890, on twenty-four hours' notice to be sent by registered post to his [*or* her] last known place of address, and an order has been made that the said A. be released from prison on his [*or* her] giving security for the above bounden B. C. and D. E. in the sum of £——— for his [*or* her] attendance for the said purpose.

Now therefore the conditions of this obligation are such that if the said A. shall duly carry out his [*or* her] said undertaking, and shall attend the Court on the day appointed for his [*or* her] public examination and any adjournment thereof, and submit himself [*or* herself] for examination and shall attend at such times on the official receiver as he may require for the purpose of performing the duties imposed upon him [*or* her] by the Bankruptcy Acts, 1883 and 1890, on receiving twenty-four hours' notice by registered post to his [*or* her] last known place of address this obligation shall be void and of no effect, otherwise to remain in full force and virtue.

Signed, sealed, and delivered, &c."

H. L. F.

1903
May 12.

MOORE, NETTLEFOLD & CO. *v.* SINGER MANUFACTURING COMPANY.

Landlord and Tenant — Distress — Sale — Purchase by Landlord of Goods distrained — 2 Will. & M. Sess. 1, *c.* 5, *s.* 2.

A sale of goods distrained in pursuance of 2 Will. & M. Sess. 1, c. 5, s. 2, must be a sale to a third party, and if the landlord purchase the goods himself the property in the goods does not pass to him.

Dictum of Blackburn J. in *King* v. *England*, (1864) 4 B. & S. 782, affirmed.

APPEAL from the Shoreditch County Court.

The defendants let a sewing machine to one Anton on a hire-purchase agreement which contained a clause providing that the defendants should have power to seize the machine if the instalments were in arrear. Anton was tenant to the plaintiffs of premises of which the rent became in arrear. The plaintiffs in July, 1902, distrained for the rent, and seized the sewing machine and sold it by auction. The plaintiffs' manager bought in the sewing machine at the auction on behalf of the plaintiffs, and let it back to Anton on a hire-purchase agreement. The instalments on the original hire-purchase agreement having become in arrear, in October, 1902, the defendants seized the machine, and this action was brought against them by the plaintiffs in the county court for conversion.

The county court judge found that the sewing machine was lawfully bought by the plaintiffs' manager as agent for them, and that the property in the machine then passed to the plaintiffs, and gave judgment for them accordingly. The defendants appealed.

Hugo Young, K.C. (*Lawless* with him), for the defendants. The county court judge was wrong. In *King* v. *England* (1), which decided that a landlord who had distrained goods for rent

(1) 4 B. & S. 784.

could not take them himself at an appraised price, Blackburn J. pointed out that the sale contemplated by the statute of William and Mary (2 Will. & M. Sess. 1, c. 5, s. 2) must be a sale to a third party, and, although in that case there was no sale at all, the proposition that a landlord cannot sell the goods to himself has appeared in every edition of Woodfall's Landlord and Tenant, including the last (1902) 17th ed. pp. 541, 542, on the authority of that case. The statute requires that the goods distrained shall be sold for the best price that can be "gotten for the same," and to allow the landlord to buy them himself would militate against this.

Lincoln Reed, for the plaintiffs. The proposition in Woodfall is too broadly stated. *King* v. *England* (1) only decided that there must be a sale of the goods, and that the landlord was not entitled to take the goods distrained at the appraised price; and although Blackburn J. thought that the sale contemplated by the statute must be a sale to a third party, that was not necessary to the decision, and must be treated as an obiter dictum.

Hugo Young, K.C., was not called upon to reply.

LORD ALVERSTONE C.J. In my opinion the principle of the decision in *King* v. *England* (1) prevents this from being a good sale or one which passed the property in the goods. The statute enables the person who has distrained to sell the goods, and in *King* v. *England* (1) the Court of Queen's Bench decided that in order to pass the property in the goods there must be a sale, and that the landlord could not take the goods himself at the price at which they were appraised; and Blackburn J. added (2): "I think the sale in pursuance of statute 2 Will. & M. Sess. 1, c. 5, s. 2, must be a sale to a third person. Otherwise many abuses might arise." I quite agree that that dictum of Blackburn J. was not necessary to the decision in *King* v. *England* (1), which only decided that in order to pass the property there must be a sale to somebody; but I think on the principle of that decision a sale by the landlord to himself is really no sale at all, and does not pass the property. In my

(1) 4 B. & S. 782.

(2) 4 B. & S. at p. 786.

1903

MOORE, NETTLEFOLD & Co. v. SINGER MANUFACTURING COMPANY.

opinion, therefore, the case is governed by the decision in *King* v. *England* (1), and we must hold that, though a form of sale was gone through, there was no real sale, and the property in the goods did not pass.

WILLS J. I am of the same opinion. I think a sale to the landlord himself was no sale at all, and that if such a thing were to be allowed it would open the door to every sort of evil. It would be contrary to all principles of justice to allow a man, who ought to endeavour to make the best price possible for the goods which he is selling, to be in a position in which it is to his interest that they should be sold for as little as possible.

CHANNELL J. I agree.

Appeal allowed.

Solicitor for defendants: *Gilbert Wansbrough.*
Solicitor for plaintiffs: *James Morley.*

(1) 4 B. & S. 782.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1903
May 11.

THE LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MANCHESTER, APPELLANTS; SUGDEN (SURVEYOR OF TAXES), RESPONDENT.

THE GRESHAM LIFE ASSURANCE SOCIETY, APPELLANTS; BISHOP (SURVEYOR OF TAXES), RESPONDENT.

Practice—Costs—Taxation—Revenue Cases—Special Case—Costs before Case put on File—Taxes Management Act, 1880 (43 & 44 *Vict. c.* 19), *s.* 59—*Order* LXV., *r.* 27, *regulation* 29—*Order* LXVIII., *r.* 2.

Order LXV., r. 27, regulation 29, is applicable to the costs of settling a special case for the opinion of the Court, in an appeal on the Revenue side of the King's Bench Division, incurred before the filing of the case.

APPEALS from orders made at chambers by Phillimore J.

The orders were made in two cases stated by Commissioners of Income Tax under s. 59 of the Taxes Management Act, 1880, and the question raised on appeal was whether in taxing the costs of an appellant in such a case, in whose favour the Court had given judgment with costs, the master had jurisdiction to take into account costs incurred antecedently to the case being placed on the file. In each of the cases the clerk to the Commissioners sent the draft of the proposed case to the appellants, and the draft was perused by the appellants' solicitor and settled by counsel. On taxation the master allowed costs in respect of the perusal and settlement of the case on the ground that they were "necessary or proper for the attainment of justice," and therefore within his jurisdiction under Order LXV., r. 27, regulation 29 (rule 10 of the Rules of 1902). The decision of the master was affirmed on appeal by the learned judge.

The respondent in each case appealed.

Sir R. B. Finlay, A.-G., and *S. A. T. Rowlatt*, in support of the appeals. The practice has hitherto been uniform that the Crown neither asked for nor paid any costs of matters preliminary to the case being placed on the file. This practice

C. A. 1903

MANCHESTER CORPORATION v. SUGDEN.

GRESHAM LIFE ASSURANCE SOCIETY v. BISHOP

is in accordance with the decision of the Court of Session in *Scottish Union and National Insurance Co.* v. *Smiles.* (1) The rules 10 and 11 of 1902 were not intended to alter the practice as to the allowance of costs otherwise than by creating a general system applicable to all Courts. They only regulate the quantum of costs allowable where the right to costs exists, and do not create a right to them where, as in this case, no such right previously existed. In *Glover* v. *Booth* (2) the Court refused to interfere with an existing practice, and that case is therefore no authority in the present one. The decision in *McIver & Co.* v. *Tate Steamers, Limited* (3), was as to the application of rule 27, regulation 29, to costs between party and party. Costs would be allowed if the case were sent back after being filed, and costs were then incurred on either side; but there is no precedent for allowing any costs incurred prior to the filing of the case.

Lawson Walton, K.C., and *Bremner*, for the Manchester Corporation. It is doubtful whether the practice was not altered after the decision in the Court of Session; but at any rate, the practice with regard to cases stated by justices has been uniform, and that Court would not be familiar with the practice under the Summary Jurisdiction Act, 1857, which does not apply to Scotland. No distinction has been suggested between the procedure under that Act and the procedure under the Taxes Management Act. On principle a properly stated case is necessary for the attainment of justice, and it is for the master to say whether the preliminary expenses were properly incurred. The master has decided that the expense of settling the case was rightly incurred, and he had power under the rules to tax those costs in favour of the successful appellant.

G. H. Devonshire, for the Gresham Life Assurance Society. The practice relied on for the Crown, if it had a binding effect, has been altered by the Rules of January, 1902. Those rules were intended to introduce uniformity, but also to give the taxing master jurisdiction over "all such costs, charges, and expenses, as shall appear to him to have been necessary or

(1) (1889) 16 R. 624. (2) (1862) 31 L. J. (M.C.) 270.
(3) [1902] 2 K. B. 184.

proper for the attainment of justice, or for defending the rights of any party." The discretion so given cannot be governed by such antecedent practice as is suggested to have existed in Crown cases. [He cited *Covington* v. *Metropolitan District Railway*. (1)]

Sir R. B. Finlay, A.-G., in reply.

COLLINS M.R. I have come to the conclusion that this appeal must be dismissed. The question arises as to costs which are incurred in preparing a special case on Revenue questions before the case actually comes to be finally approved and presented to the Court. There can be no doubt whatever that, under the modern practice at all events (and it seems to me to be a very convenient practice), the parties interested in the case are allowed or invited to see the case in its proposed form, and are then allowed or invited to make suggestions and amendments upon it. It seems to me that it is very desirable that this should be done, because cases of this kind are usually complicated and often involve large sums of money; and if a case when stated does not come in the final form to a hearing on the real points which the parties desire to try, the only alternative is that the Court has to send it back again, and that involves a good deal of expense. It being necessary as a matter of practice and of common sense that those costs should be incurred before the case is in a condition ripe for hearing, it seems contrary to common sense and natural justice that neither of the parties (each of them in the same position as far as this matter is concerned) should be able to recover the costs necessarily incurred for the purpose of enabling the Court to do justice to the parties by its decision. That being, as it were, the primâ facie view of the case, we have got to see whether there is anything in any Act of Parliament which cuts down the jurisdiction of the taxing masters in this special class of subject. It is suggested that the statute which provides the machinery for bringing these cases for decision before the Courts disables the successful party from receiving from his opponent any of the costs antecedent to the statement of the

(1) [1903] 1 K. B. 231.

C. A. 1903

MANCHESTER CORPORATION v. SUGDEN.

GRESHAM LIFE ASSURANCE SOCIETY v. BISHOP.

Collins M.R.

case. The words of s. 59 of the Taxes Management Act, 1880, which are said to bear that construction are these: ". . . . (1.) either party to the appeal, if dissatisfied with the Commissioners' determination as being erroneous in point of law may require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon. The case shall set forth the facts and the determination." Then sub-s. 2 (*b*): "The High Court shall hear and determine the questions of law arising on a case transmitted under this Act . . . . and may make such order as to costs as to the High Court may seem fit." If that primâ facie throws upon the Commissioners the obligation of stating the case, so that the litigation, so to speak, between the parties does not begin until after that is done—if that is the effect of the section, it might very well be that no costs incurred antecedent to the statement of the case ought to be thrown on either party; and whether as a matter of law or as an inference of the intention of the Legislature, that appears to be the view which was taken in the Scottish case to which we have been referred: *Scottish Union and National Insurance Co.* v. *Smiles.* (1) In that case the Lord President said: "The Court knows nothing about such a case as this till it is presented to them for consideration, and we are instructed by the statute that such cases are to be prepared by the Commissioners of Income Tax. When the case is presented we have nothing to do but to hear parties on it, and therefore the expenses we have to award are, I think, just what would be called in ordinary cases 'expenses of process,' and such expenses do not include the expense of wranglings with the Commissioners as to the statement of the case. I think the auditor was right in disallowing these expenses." I do not read that as a pronouncement as to the exact exigency of the statute itself, but rather as a pronouncement as to what might be taken to be in ordinary cases the intention of the Legislature; but if and so far as it does rest upon any view that the statute in terms prohibits the Court from dealing with the expense antecedent to the statement of the case, I cannot agree with the decision. I think there is

(1) 16 R. 624.

clear authority in this country that that is not the true view, because the statute regulating the statement of special cases by magistrates in this country is in terms so nearly identical with the Taxes Management Act that no real distinction has been pointed out between them. It has been decided in the Court of King's Bench in *Glover* v. *Booth* (1) that on a case stated on appeal from justices in petty sessions antecedent expenses ought to be and might be, in proper cases, recovered upon taxation by the one party or the other if the circumstances of the case are such as to make it just and right that this should be done. I think on a further ground that we are not greatly pressed by the Scottish decision. We have now a series of rules, having by Act of Parliament the authority of law, regulating the mode of taxation, and the scheme of those rules was to make taxation uniform. By the rules themselves the taxation of this special class of cases is swept into a general scheme, and one of the rules of that scheme, Order LXV., r. 27, regulation 29, is in these terms: "On every taxation the taxing master shall allow all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party." I have no reason to suppose that any such scheme of taxation has been enacted for Scotland: there has certainly been no reference to anything of the kind in the course of the argument. Neither does it seem that the Scottish Courts are familiar with the practice of stating special cases according to the system that obtains in this country; and, therefore, it seems to me that that case (though of course very valuable as an expressed opinion, coming from such a quarter) really does not in any sense bind the practice in the English Courts. When one comes to look at the whole matter from a common sense standpoint, it seems to me now that, in modern times at all events—when, if it ever was the practice, it has ceased to be the practice for the Commissioners to state the case themselves without inviting the assistance of the parties in its preliminary stages—it would be to do an injustice if the parties who had to incur these expenses

(1) 31 L. J. (M.C.) 270.

C. A. 1903

MANCHESTER CORPORATION v. SUGDEN.

GRESHAM LIFE ASSURANCE SOCIETY v. BISHOP.

for the purpose of assisting the Court and presenting the case in a proper form for argument and decision were debarred from recovering their costs from their defeated opponent. On these grounds it seems to me that the decision of the master, confirmed by the learned judge, was right, and that this appeal must be dismissed.

STIRLING L.J. I am of the same opinion. I confess, speaking for myself, that but for the recent change in practice introduced by the Rules of 1902 I should have felt very considerable difficulty in arriving at the conclusion to which I have actually come. Having regard to what has been effected by the change in the terms of regulation 29 of Order LXV., r. 27, I think that the decision of the master ought to be supported.

The matter stands thus: In a Revenue case the surveyor of taxes representing the Crown has been ordered to pay to the appellants in that particular case the costs of the appeal; and that order has to be worked out in accordance with the practice of the Court relating to the taxation of costs. The Taxes Management Act of 1880 provides, as has been pointed out, that any person who is "dissatisfied with the determination" of the Commissioners "as being erroneous in point of law" may "declare his dissatisfaction," and may require the Commissioners "to state and sign a case for the opinion of the High Court." Frequently, no doubt, such a case may be stated by the Commissioners without referring to the parties or to the persons—the solicitors or counsel—who represent them; but in complicated cases there is no question that difficulties may arise in stating the case which make it necessary for the Commissioners to lay the draft before the parties and their legal advisers. The Judicature Act provides for the making of rules by the Rule Committee from time to time, and s. 17 of the Judicature Act, 1875, says that all rules made in pursuance of the section shall regulate all matters to which they extend, until annulled or altered in pursuance of the section. By a rule made in January, 1902, the terms of the then existing rules as to costs were altered, and it is now provided that, "On every taxation the taxing master shall allow

all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." In the present case, before the special case was settled, the draft was laid before the advisers of the appellants, who considered it, and altered it, and the alterations were adopted by the Commissioners—in part at any rate; and the taxing master before whom the present case has come has certified that what was done with reference to the settlement of the case on behalf of the appellants on this appeal was such that the costs were "necessary or proper for the attainment of justice." Now that being so, and it being also provided by Order LXVIII., r. 2, that, amongst other orders, Order LXV. as to costs shall apply to all proceedings on the Revenue side of the King's Bench Division, it seems to me that it became the duty of the taxing master to apply the new regulation 29 to the taxation of the present case. It is not suggested that he has come to a wrong conclusion in finding that these costs were necessary or proper for the attainment of justice. I therefore think that he had jurisdiction, and I only desire to say that in my view it does not follow from this decision that in every case the costs of perusing the proposed case will be allowed to either party. It will be for the taxing master to consider the circumstances of each case, and to form a determination as to whether or no the costs incurred are necessary or proper for the attainment of justice. It follows, I think, from our decision that the rule must apply as well to the Crown as to the subject, and no doubt in many cases the Crown will get the benefit of it.

Appeal dismissed.

Solicitors for Manchester Corporation: *Austin & Austin, for Town Clerk, Manchester.*

Solicitors for Gresham Life Assurance Society: *Devonshire, Monkland & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

A. M.

1903
May 15.

THE KING *v.* JUSTICES OF CORNWALL.

Poor-rate—Appeal from Special Sessions—Jurisdiction of Quarter Sessions over Costs before Special Sessions — Parochial Assessments Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 6.

Where, upon an appeal from special sessions under s. 6 of the Parochia Assessments Act, 1836, the quarter sessions allow the appeal, the quarter sessions have jurisdiction to set aside the order of the special sessions giving costs to the successful party at the special sessions, and also to order that the unsuccessful party at the special sessions shall be paid the costs incurred by him at the special sessions.

MANDAMUS to quarter sessions to hear an application for costs.

On March 27, 1902, Jane Sandercock, who was rated as the occupier of a public-house known as the Cornish Arms, in the parish of St. Blazey, in the St. Austell Union, gave notice of appeal to the special sessions for the division comprising the said parish against a rate made on October 23, 1901, for the said parish, on the ground that she was overrated in respect of the said public-house. The appeal was heard by the special sessions on June 10, 1902, and was allowed, and the justices ordered that the assessment of the said Jane Sandercock should be reduced from 52*l.* gross estimated rental and 41*l.* rateable value to 35*l.* gross estimated rental and 29*l.* rateable value, and that the assessment committee should pay her 30*l.* 15*s.* 5*d.* for her costs of the appeal.

From that decision the assessment committee appealed to the quarter sessions. On October 14 the appeal was heard. The quarter sessions allowed the appeal with costs of the appeal to quarter sessions. Application was then made to the Court of quarter sessions for an order setting aside the order of special sessions that the assessment committee should pay J. Sandercock her costs at special sessions, and directing J. Sandercock to pay to the assessment committee their costs at special sessions. The quarter sessions, however, refused the application upon the ground that they had no jurisdiction to grant it. A rule was then obtained by the assessment committee for a mandamus to the justices to hear the application.

1903

REX v. CORNWALL JUSTICES.

Foote, K.C., and *W. J. Lawrance*, shewed cause against the rule. The quarter sessions had no jurisdiction to order Sandercock to pay the assessment committee their costs of appearing before the special sessions. The section which established special sessions for the hearing of appeals against rates, s. 6 of the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), also gave the right of appeal from the decision of the special sessions to the quarter sessions, and provided that the justices at quarter sessions, "upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper." The words "such costs as they shall think proper" refer simply to the amount which, in the absence of consent to tax out of sessions, has to be ascertained and specified by the Court of quarter sessions itself. They have no reference to costs extraneous to the appeal. Apart from special statutory direction, there is no natural jurisdiction in an appellate Court to order the payment of costs incurred in the Court below. For instance, the Summary Jurisdiction Act, 1857, which enables the High Court to hear appeals from justices by way of special case, provides by s. 6 that upon the hearing of the appeal the Court "may make such orders as to costs as to the Court may seem fit." But in *Newman* v. *Jones* (1) Mathew and A. L. Smith JJ. doubted whether that Act empowered the Court to give the successful appellant his costs in the Court below; and in *Slaughter* v. *Mayor of Sunderland* (2) Cave and Vaughan Williams JJ. held that it did not.

With regard to the order of the special sessions that the assessment committee should pay to Sandercock her costs, it may be that the quarter sessions had jurisdiction to set that order aside, and to that extent the decision of the quarter sessions was wrong. Sect. 7 of the Parochial Assessments Act, 1836, provides that "No order of the said justices in special sessions shall be of any force pending any appeal touching the same subject-matter to the Court of general or quarter sessions of the peace having jurisdiction to try such

(1) (1886) 50 J. P. 373. (2) (1891) 55 J. P. 519.

1903

REX v. CORNWALL JUSTICES.

appeal, or in opposition to the order of any such Court upon such appeal." Which implies that where the quarter sessions allow the appeal they may reverse the whole order of the Court below, including the part of it awarding costs. In *Gage* v. *Collins* (1) the Court of Common Pleas held that, under a section which provided that on an appeal from a county court the superior Court "may make such order with respect to the costs of the appeal as such Court may think proper," they had power to deal with the order for payment of costs below as accessory to the judgment appealed from. They did not, however, hold that there was any general power to make the order as to costs which the Court below ought to have made. So far as the quarter sessions refused to order Sandercock to pay to the assessment committee their costs at the special sessions they were right.

Ryde, for the assessment committee, in support of the rule. The language of s. 6 of the Act of 1836 is ambiguous, but it is open to the construction that it was intended to give the quarter sessions power to order that the successful appellant should be paid the costs incurred by him in the Court below. But if so, then as it is reasonable and just that the successful appellant should have those costs, the Court ought to put that construction on the section. The cases cited on the other side, as to the want of jurisdiction in the superior Court to award costs in the Court below on allowing an appeal from justices, are not in point. There the tribunal appealed from and the tribunal appealed to are wholly differently constituted, and primâ facie a Court has jurisdiction only over the costs incurred before itself. But the Courts of special sessions and quarter sessions are not wholly differently constituted. The members of the former like those of the latter are simply county justices, the special sessions being nothing more than a committee of the larger body who sit at quarter sessions, and there is nothing to prevent the justices who sat at special sessions from sitting also on the appeal at quarter sessions. In a sense, therefore, the two sessions may be regarded as different sittings of one and the same Court. Less strong language is consequently

(1) (1867) L. R. 2 C. P. 381.

necessary to give jurisdiction over the costs in the Court below in the case of an appeal to the quarter sessions than in that of an appeal to the superior Court.

LORD ALVERSTONE C.J. In this case a rule was moved for a mandamus to the quarter sessions to entertain an application for an order as to the costs of the hearing at special sessions of a matter which had been further appealed to them. The question raised, as to whether the quarter sessions had jurisdiction to entertain the application, is one which does not appear to have been decided before. It depends upon the construction of s. 6 of the Parochial Assessments Act, 1836, which provides that upon an appeal being brought from special sessions to the quarter sessions, the justices at the quarter sessions, "upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper." And the question is whether that section gives the quarter sessions power to deal, not merely with the costs of the appeal before them, but also to vary the order of the special sessions as to the costs incurred in the Court below. The language is ambiguous: it is open to either construction. And, that being so, I think it would be more in accordance with justice if we were to hold that the justices had the power to make such an order as to costs as would put the parties in the position that they ought to be in having regard to the result of the litigation. I think it must have been intended by the section to give the quarter sessions as large a discretion over costs as possible. Support is given to this view by the language of the following section, s. 7, which provides "that no order of the said justices in special sessions shall be of any force pending any appeal touching the same subject-matter to the Court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such Court upon such appeal." This would include the order of the special sessions as to costs. But if such an order is to be of no force pending the appeal, it is to be inferred that a fortiori it is to be of no force after the appeal

1903

REX v. CORNWALL JUSTICES.

Lord Alverstone C.J.

has been determined by the quarter sessions in the appellant's favour. And if the quarter sessions were intended to have power to reverse the order of the special sessions as to costs, it was presumably also intended that they should have the power to make the order as to costs which the special sessions ought to have made.

With regard to the cases relied on by Mr. Foote, the language of s. 6 of the Summary Jurisdiction Act, 1857, upon which those cases turned, was very different from that of the section before us, and cannot afford any guide in the present case.

WILLS J. I am of the same opinion. The language which we are called upon to construe is not sufficiently definite to enable us to say with absolute certainty, looking at the mere words used, whether it should be read so as to include power to deal with the costs below or not; and I think either construction might be adopted without doing violence to the language. When that is the case, it is, I think, permissible to look at the consequences which would follow upon the different constructions. If the construction adopted by my Lord, in which I entirely agree, is accepted, it enables the Court of quarter sessions to do complete justice between the parties. If the contrary view is to prevail, and if the discretion of the quarter sessions is to be regarded as limited to the question of amount, the greatest injustice might follow. I am of opinion that the rule should be made absolute.

CHANNELL J. I entirely agree that as the words are capable of bearing the meaning contended for by the assessment committee, and there would be great inconvenience, and possibly injustice, if we did not hold so, we are justified in so holding.

Rule absolute.

Solicitors for assessment committee: *Bell, Stuart, May & Howe, for J. Stephens, St. Austell.*

Solicitors for Sandercock: *Carthew & Wheeler.*

J. F. C.

CONSETT URBAN DISTRICT COUNCIL *v.* CRAWFORD.

1903
May 20, 21.

Local Government — Inspection by Local Authority — Admission to Private Premises — Right of Entry without Permission of Occupier — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 102, 306.

Sect. 102 of the Public Health Act, 1875, provides that a local authority or any of their officers "shall be admitted into any premises for the purpose of examining as to the existence of any nuisance thereon," and if admission is refused application may be made to a magistrate for an order to admit.

By s. 306, any person who wilfully obstructs any member of a local authority in the execution of the Act is liable to a penalty.

Members of the appellant council, purporting to act under s. 102, entered a yard on the respondent's premises in his absence without having first requested or obtained his permission so to do, and, while there, were locked in by the respondent:—

Held, that s. 102 does not authorize an entry on private premises without the permission of the occupier being first requested; that the members of the appellant council while on the premises of the respondent were, therefore, not engaged in the execution of the Act; and that the respondent had not committed an offence under s. 306.

CASE stated by justices.

An information was preferred by the appellants against the respondent charging him with having unlawfully and wilfully obstructed certain members of the appellant council, while duly employed in the execution of the Public Health Act, 1875, contrary to s. 306 of the Act.

The following facts were proved or admitted: The appellants having passed a resolution that their district be inspected in pursuance of s. 92 of the Public Health Act, 1875, by a committee to consist of the full council, certain members and officers of the council visited a large number of properties in the district, and on arriving at a certain street some of the councillors went into the yard of premises belonging to the respondent, in respect of which premises notice to abate a nuisance had been given to the respondent on July 16, 1902. The respondent was not then present, and permission to enter was not asked for or obtained. He arrived shortly afterwards, and, having

1903

CONSETT URBAN COUNCIL v. CRAWFORD.

ascertained that the councillors were in his yard, he pulled the door to, put a padlock on and locked them in, and kept them there for about ten minutes.

The justices held that as the councillors had not asked permission to enter the premises they were not admitted into premises within the meaning of s. 102 of the Public Health Act, 1875 (1), and that the respondent, therefore, had not wilfully obstructed the councillors in the execution of the Act, and the justices, therefore, dismissed the information.

The question of law for the opinion of the Court was whether the words "shall be admitted," in s. 102 of the Act, authorize the members and officers of a local authority to enter any premises without first requesting permission.

C. A. Russell, K.C., and *R. C. Glen*, for the appellants. It is not contended that s. 102 gives the members of a local authority an absolute right of entry, but the case of the *Wimbledon Urban District Council* v. *Hastings* (2) shews that there is a primâ facie right of entry, and if no opposition or objection is made to their entry, and they do not employ force

(1) Public Health Act, 1875, s. 102: "The local authority, or any of their officers, shall be admitted into any premises for the purpose of examining as to the existence of any nuisance thereon . . . . at any time between the hours of 9 in the forenoon and 6 in the afternoon . . . . Where under this Act a nuisance has been ascertained to exist, or an order of abatement or prohibition has been made, the local authority or any of their officers shall be admitted from time to time into the premises between the hours aforesaid until the nuisance is abated or the works ordered to be done are completed, as the case may be.

"If admission to premises for any of the purposes of this section is refused, any justice on complaint thereof on oath by any officer of the local authority (made after reasonable notice in writing of the intention to make the same has been given to the person having custody of the premises) may by order under his hand, require the person having custody of the premises to admit the local authority or their officer into the premises during the hours aforesaid, and if no person having custody of the premises can be found, the justice shall on oath made before him of that fact, by order under his hand authorize the local authority or any of their officers to enter such premises during the hours aforesaid."

Sect. 103: "Any person who refuses to obey an order of a justice for admission of the local authority or any of their officers on any premises shall be liable to a penalty not exceeding five pounds."

(2) (1902) 87 L. T. 118.

in effecting an entrance, it cannot be said that they are not, when on the premises, in the execution of their duty under the Act; and it makes no difference that in the present case the councillors did not obtain permission from the respondent to enter his premises. At the most that omission was a mere error in procedure, and did not entitle the respondent to obstruct them in the execution of their duty. The respondent should, therefore, have been convicted.

Simey, for the respondent. The words "shall be admitted" in s. 102 mean shall be permitted to enter, and that implies that permission must be asked for. If it is refused, then the section provides that application may be made to a magistrate for an order of admission; but it was decided in *Wimbledon Urban District Council* v. *Hastings* (1) that the order is not to be granted as a matter of course; notice has to be given to the occupier, and it is within the discretion of the magistrate whether he will make the order or not. The appellants, not having asked for permission to enter, cannot be in a better position than they would have been if permission had been asked for and refused. They were not employed in the execution of the Act, but were trespassers on the respondent's premises, and the respondent was not guilty of any offence under s. 306.

[He also contended that the respondent had not in fact "obstructed" the members of the appellant council within the meaning of s. 306.]

Russell, K.C., replied.

LORD ALVERSTONE C.J. I should be sorry if anything that I may say were to be taken as an expression of approval of the respondent's conduct in this matter. I think that conduct was much to be regretted; but this is a criminal charge, and, in order to see whether an offence has been committed, we must consider what are the rights of the local authority. By s. 92 of the Public Health Act, 1875, a duty is imposed upon every local authority of causing an inspection to be made of their district from time to time for the purpose of ascertaining what nuisances exist calling for abatement.

(1) 87 L. T. 118.

1903

CONSETT URBAN COUNCIL v. CRAWFORD.

Lord Alverstone C.J.

It is obvious that in many cases a nuisance might be discovered and dealt with without any necessity for an entry to be made upon private property; but in some cases it would be necessary to enter upon private property. In order to see what are the rights and duties of a local authority as to entering private premises, and what is the obligation upon the person whose property is about to be inspected, one must look at s. 102 of the Act. [His Lordship read s. 102, and continued:—]

It was decided by this Court in the case of *Wimbledon Urban District Council* v. *Hastings* (1), and I adhere to everything that was said in that case, that s. 102 does not confer upon the local authority an absolute right of entry—that is to say, a magistrate when applied to by a local authority for an order of admission is not bound to make the order; he has a discretion in the matter. That decision is, therefore, an authority for saying that s. 102 does not give a statutory right of entry, in the sense of empowering the local authority to enter without first obtaining permission; and where admission is refused, application must be made to a magistrate for an order. That being the procedure to be followed, the case finds that the appellants had not obtained any permission to enter the respondent's premises, and, in order to overrule the decision of the magistrates, we must hold that, the appellants having entered upon the premises without permission, they were there in such circumstances that interference with them would be an obstruction of them in the execution of the Act. The magistrates held that as neither permission to enter nor an order of a magistrate had been obtained, the appellants could not be said to be on the premises in the execution of their duty. I do not see my way to saying that the magistrates were wrong in coming to that decision; and the appeal must, therefore, be dismissed.

WILLS J. I am of the same opinion, and I share the reluctance of my Lord to say anything which could be construed as an encouragement of the respondent's conduct.

(1) 87 L. T. 118.

Under s. 92 the general duty of making an inspection of the district falls upon the local authority. Then s. 102 contains a complete code dealing with the right of the local authority to enter upon private premises for the purpose of making an inspection. The section does not contain any express provision applicable to a case, such as this, where permission to enter was neither asked for nor refused. If permission is refused, whether with the authority of the occupier or not, the proper course is to apply to a magistrate for an order requiring the person having the custody of the premises to admit the local authority. The occupier in this case had no opportunity of refusing permission, because he was not present when the members of the council arrived at his premises. The question is, How does s. 102, reasonably construed, apply to the circumstances of this case? Now, the refusal by the occupier of permission to enter does not of itself constitute an offence, because it is expressly provided that in that case the proper course is to apply to a magistrate for an order of admission, which is not granted as a matter of course and against which cause may be shewn by the occupier, and it would be very strange if an occupier should be in a worse position where he has had no opportunity of refusing. I think, therefore, that the intention was that there should be an opportunity given to the occupier of refusing admission, and that permission to enter must, therefore, first be asked for. The section expressly provides for a case where the occupier cannot be found, and, therefore, no difficulty arises on that score.

I think that the fallacy underlying Mr. Russell's argument, that the necessity of applying for permission is a mere matter of procedure, is that he is confusing circumstances which are necessary to entitle a person acting in the supposed execution of a public duty to notice of action with circumstances which would afford such a person the defence of a legal justification for his conduct.

I think that, if the persons making the inspection had had the right to enter the respondent's premises without first obtaining his permission, there would clearly have been in the circumstances of this case an obstruction within the meaning

1903

CONSETT URBAN COUNCIL v. CRAWFORD.

of the Act. An occupier who exposes the members of a local authority even to a well-grounded apprehension of personal detention by way of retaliation for their act of entry most certainly, in my opinion, obstructs them within the meaning of s. 306.

CHANNELL J. I agree. The language of s. 102 shews quite clearly that the Legislature has stopped short of giving a local authority the right to enter private premises of their own motion. The section says that they "shall be admitted"; but in the present case the members of the council were not "admitted": they entered of their own motion without asking for permission. They were, therefore, in the position of trespassers on the respondent's land, and, however improperly the respondent may have acted towards them, he has not committed an offence under s. 306.

I agree that, if the members of the appellant council had been on the premises in the execution of their duty, the facts of this case clearly amount to obstruction on the part of the respondent.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons, for Welford, Consett.*

Solicitors for respondent: *Belfrage & Co., for Aynsley, Consett.*

F. O. R.

THE KING *v.* HIGH BAILIFF OF WESTMINSTER. *Ex parte* THE LONDON COUNTY COUNCIL.

1903
May 20.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 38, 51—*Notice of Intention to summon Jury—Purchase-money and Compensation—Offer by Promoters—Time for Acceptance.*

Where in a proceeding to take and purchase lands under the Lands Clauses Consolidation Act, 1845, the promoters have given notice under s. 38 of their intention to summon a jury, and have therein stated the sum which they are willing to give as and for purchase-money and compensation, and, the offer not having been accepted, a jury is summoned, the claimant is entitled at any time before the verdict of the jury is given to accept the offer of the promoters, and the jury should in such a case be directed to return a verdict for the amount of the offer.

RULE NISI for a mandamus.

On March 4, 1902, the London County Council, under the powers conferred on them by the London County Council (Improvements) Act, 1899 (which Act incorporated the Lands Clauses Consolidation Act, 1845), served notice to treat in respect of certain premises, and by the notice the council also claimed under s. 20 of the Act (1) that the premises were in

(1) London County Council (Improvements) Act, 1899 (62 & 63 Vict. c. cclxvi.), s. 20: "The council may with the approval of the Secretary of State for the Home Department claim in any notice to treat for the purchase of any lands intended to be taken for the purpose of this Act—

"That the lands to which the notice refers are or comprise any houses, courts or alleys unfit for human occupation;

"That the narrowness, closeness, and bad arrangement or the bad condition of the streets and houses or groups of houses upon any such lands, or the want of light, air, ventilation or proper conveniences, or any other sanitary defects, or one or more of such causes renders any such lands or any buildings thereon prejudicial to the health of the inhabitants either of the buildings on the said lands or of the neighbouring buildings.

"And in the event of any such claim, then on the occasion of assessing the amount of compensation payable in respect of such lands the Court or person settling the same shall determine whether such lands fall wholly or in part within any of the descriptions hereinbefore mentioned, and if they shall so decide then in assessing the compensation payable under this Act in respect of any such lands evidence shall be receivable by such Court or person to prove—

"(1st.) That the rental of any house or premises was enhanced by reason of the same being used for illegal purposes or being so over-

1903

REX v. HIGH BAILIFF OF WESTMINSTER. LONDON COUNTY COUNCIL, *Ex parte.*

an insanitary condition by reason of certain specified causes, which rendered the premises prejudicial to the health of the inhabitants thereof or of the neighbouring buildings. The persons served with the notice to treat duly made a claim, and on November 5, 1902, the council gave notice to the claimants of their intention to summon a jury, and in the notice stated the sum of money which they were willing to pay for the land to be taken. The offer was not accepted, and on November 22, 1902, the council issued their warrant to the high bailiff of Westminster, requiring him to summon a special jury to determine whether the premises were insanitary, and what compensation should be paid by the council to the claimants.

The case was heard before the deputy high bailiff of Westminster and a special jury on December 12, 1902. The question whether the premises were insanitary was first tried, and, after hearing evidence on behalf of the council and of the claimants, the jury found that the property was insanitary. Counsel for the claimants thereupon stated that his client would accept the offer of the council. This was objected to on behalf of the council on the grounds that the case was in the hands of the jury, and that the amount of compensation to be paid must be determined by their verdict.

The deputy high bailiff held that the claimants were entitled to accept the offer, and withdrew the case from the jury and discharged them. No judgment was recorded.

A rule nisi was obtained on the motion of the London County Council calling upon the high bailiff to shew cause why a writ of mandamus should not issue directed to him, commanding him to summon a special jury to settle and determine the amount of purchase-money and compensation to be paid to the claimants.

---

crowded as to be dangerous or injurious to the health of the inmates;

"(2ndly.) That any house or premises are in a state of defective sanitation or are not in reasonably good repair; or

"(3rdly.) That any buildings on any such lands are unfit and not reasonably capable of being made fit for human habitation:

"And if such Court or person be satisfied by such evidence, then the purchase-money and compensation in respect thereof shall be assessed and determined according to the principles indicated in s. 21 of the Housing of the Working Classes Act, 1890."

Danckwerts, K.C., and *R. C. Glen*, for the claimants, shewed cause against the rule. The question is as to the stage of the proceedings at which the claimant is no longer entitled to accept the statutory offer made by the promoters of the undertaking. The offer has to be made under s. 38 of the Lands Clauses Act, 1845 (1), and can only be made in the notice given by the promoters of their intention to cause a jury to be summoned: *Reg.* v. *Manley Smith, In re Church and London School Board* (2); *Reg.* v. *Smith, In re Westfield and Metropolitan Ry. Cos.* (3) There is no provision in the Act that the offer must be accepted within a definite period, nor can it be withdrawn; it therefore remains open as a binding offer, and may be accepted at any time before the jury have returned their verdict. It may be that the jury ought to have been directed to find a verdict for the amount of the offer, but the promoters did not ask that that should be done, and, if the claimants were within their rights in accepting the offer when they did, the Court will not send the case before another jury merely to obtain a formal verdict.

Dickens, K.C., and *Corrie Grant*, for the London County Council, in support of the rule. Under s. 38 there is an

(1) The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 38: "Before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works."

Sect. 51: "On every . . . . inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking . . . . one half of the costs of summoning, impanelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment therein in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs other than as aforesaid incident to such inquiry."

(2) (1892) 40 W. R. 333.

(3) (1883) 12 Q. B. D. 481.

1903

REX v. HIGH BAILIFF OF WESTMINSTER. LONDON COUNTY COUNCIL, *Ex parte.*

absolute duty on the promoters to give ten days' notice of their intention to summon a jury, and in that notice they have to state what sum they are prepared to pay. There is a correlative duty on the claimant to accept the offer within the ten days, if he intends to do so at all; if the offer is not accepted, a jury is to be summoned, and the amount can then only be settled by the jury's verdict. The intention of the Legislature was that the claimant should have the period of ten days within which to consider whether he should accept the offer, so that the expense of summoning the jury and of preparing for trial may not be incurred unnecessarily. This view is supported by the judgment of Lord Coleridge C.J. in *Reg.* v. *Smith* (1), and of Cockburn C.J. in *In re Hayward and the Metropolitan Ry. Co.* (2), where he points out that the notice to summon the jury gives the claimant full ten days' time to consider the propriety and expediency of accepting the promoters' offer. Further, by s. 51, if the sum awarded by the jury be less than or the same as that offered by the promoters, the claimant has to bear his own costs, and half the costs of summoning the jury and taking the inquiry; but if the offer may be accepted at any time before verdict, claimants will have an easy way of escaping all liability for costs, because s. 51 only applies where there is a verdict. Again, this inquiry was held under the London County Council Act, 1899, s. 20 of which provides for alternative methods of assessing the compensation. It cannot have been intended that a claimant, after the issue as to insanitary condition of the property has been decided against him, should then be entitled to accept the offer, the amount of which in practice is always fixed so as to allow a considerable margin for every possible contingency.

LORD ALVERSTONE C.J. In dealing with this case I wish to dismiss from my mind as far as possible everything recollected from past experience of these cases, because one always mistrusts one's own recollection. I will only say this, that if the contention put forward on behalf of the London County

(1) 12 Q. B. D. at p. 487.
(2) (1864) 4 B. & S. 787; 33 L. J. (Q.B.) 73, at p. 77.

Council is right, a large number of cases have in the past been settled on a different view of the parties' rights. If it is true that the offer of the promoters is not binding on them, but can be withdrawn in the sense that they can claim to take the verdict of the jury, not merely with reference to how the costs are to be borne, but in order that they may pay less than the amount offered, I think that it is remarkable that no authority for the contention is to be found in any of the cases decided under the Lands Clauses Act.

It is provided by s. 38 of the Act that in the ten days' notice which the promoters are to give of their intention to summon a jury they shall state what sum of money they are willing to give for the interest in the lands sought to be purchased by them, and for the damage sustained by the execution of the works. It is not an offer that is to be open for ten days only, but an offer of the sum which they are willing to give. Now we have been pressed to say that that means that the offer must be accepted for the purpose of a contract within ten days, because, if it is not accepted, the promoters of the undertaking will go on, and will incur costs in getting their case ready for trial. No doubt they will incur costs, but the necessities of Mr. Dickens' argument forced him to overlook the fact that the vendor, whose property is being compulsorily taken, and who is certainly entitled not to be put in a worse position than the promoters, is in the same position of difficulty. He has got to incur the costs of preparing for trial, and, if the jury give a less amount than the amount offered, he will not only have to bear the whole of his own costs of the inquiry, but he will also have to pay some portion of what I may call the joint costs. Therefore the position is not, as suggested by Mr. Dickens, that the only question is aye or no, shall the promoters be forced to incur costs; there is also the question whether or not the vendor shall be in a position of running the risk of having to bear a considerable amount of costs himself. The only other section which bears upon the matter is s. 51. [His Lordship read the section.] That is a part of the burden which the vendor takes upon himself which Mr. Dickens' argument forced him to overlook: it is equally as

1903

REX v. HIGH BAILIFF OF WESTMINSTER. LONDON COUNTY COUNCIL, *Ex parte.*

Lord Alverstone C.J.

important to him as the costs which have to be borne by the promoter. Now, without regarding the case as an authority, I think that what Lord Coleridge said in the case of *Reg.* v. *Smith, In re Westfield and Metropolitan Ry. Cos.* (1) is a correct enunciation of the law applicable to this particular point: "The promoters are taking a person's property adversely to his own benefit, and it does not seem an unreasonable thing that, before they are allowed to take from him that which he does not desire to part with, they should make him an offer by which they are bound to abide, and upon which he can take the advice of his surveyor, and come to a conclusion whether or not he will accept it or embark upon costly litigation with the promoters." If the claimant has ten days only within which to accept the offer, I do not think that Lord Coleridge would have used that language; and when he refers to "embarking on costly litigation," I would again point out that the claimant does not necessarily get rid of the costly litigation by not accepting the offer, for by going on he still has a very great risk of having to bear a great proportion of it. Therefore under the Lands Clauses Act I think it is clear that the offer is intended to exist as an offer down to the time of the verdict of the jury being given. Now, under these circumstances, it seems to me that there is under the statute an offer binding on the promoters up to the time when the verdict is given, and that the claimant is entitled to say that he will accept that offer, of course coming under the responsibility which follows from that acceptance, namely, that he cannot be in a better position than if the verdict of the jury had been given for the amount of the offer, in which case he would not get his costs, and he would have to bear half the joint costs under s. 51.

The only remaining question for consideration is whether s. 20 of the London County Council Act, 1899, has made any difference as regards the point which we have to consider. I agree that it is an involved section, and that it is very difficult to know exactly how the section is to be worked; but at any rate the section provides for something which is to take place on the occasion of the assessing of the amount of compensa-

(1) 12 Q. B. D. 481, at p. 487.

tion. There is to be a sort of first issue tried as to whether the property falls within a certain class; and if it is so found, then the compensation is to be assessed on a certain principle. The question is, Does that section make any difference on the point which we are considering? The Act incorporates the Lands Clauses Act, and it has been admitted by counsel on both sides that the real decision must be as to the position of the claimant under the Lands Clauses Act, unless s. 20 makes any difference. In my opinion s. 20 only makes this difference, that it sets up two standards of compensation. It is impossible to suggest that there is under s. 20 of this Act a greater right of withdrawal of the offer than there is in an ordinary case under the Lands Clauses Act.

There is only one other observation with which I wish to deal. It is said that, practically speaking, it would be a hardship if this view were adopted, because it is well known that in offers which are made in cases under s. 20 of the London County Council Act, 1899, there is a very considerable margin allowed, in order that the promoters may not run so much risk of having to pay all the costs. I beg leave to state that that argument applies just as strongly to cases under the Lands Clauses Act as it does to those under s. 20. I am not sure that it does not apply even more strongly, because I think it would probably be easy to judge whether the facts of a case brought it within the lesser or higher assessment of compensation under s. 20. It is common knowledge that the offers made in compensation cases always allow a very considerable margin on the actual value of the property, in order that a fair estimate may be made of what a jury is likely to give. For the purpose of s. 51, when an offer is made there would in practice always have to be a margin, whether it was a case of property taken under the Lands Clauses Act or property taken under the Act of 1899.

I therefore think there is an additional reason for not adopting the argument presented by Mr. Dickens in this case, and that the case must be decided in accordance with the principle applicable to an ordinary compensation case.

I come to the conclusion that, under the circumstances of

1903

REX v. HIGH BAILIFF OF WESTMINSTER. LONDON COUNTY COUNCIL, *Ex parte.*

Lord Alverstone C.J.

this case, the claimants were entitled to accept the offer at the time when they did so, and that the only effect of their acceptance of the offer is that they must bear their own costs and pay half the joint costs referred to in s. 51. I think the proper course here would have been to have directed a verdict by the jury for the amount of the offer; but it is useless to send the case down for a new trial, because the only result would be that the claimants would be entitled to say that they accepted the offer; and then the verdict of the jury would have to be given for that amount. For these reasons I am of opinion that the rule must be discharged.

WILLS J. I agree, and I have nothing to add to the remarks which have fallen from my Lord.

CHANNELL J. I agree also, and I think my Lord has made the matter perfectly clear. I think that this offer was a standing offer that could not be withdrawn, but even if it could be withdrawn, it never had been, so that as soon as it was accepted there was a contract as to the price, and the question which the jury would otherwise have had to determine was at an end, except possibly as to costs. As to the costs, if the promoters, in this case the London County Council, could get any costs by going on, of course they would have been entitled to go on for the purpose of getting those costs; but the outside they could get was half of the joint costs. They would have been entitled to have the verdict entered for the amount agreed upon, for the purpose of making it clear how the costs were to be dealt with; but they did not ask for that, and as it is agreed that they are to be in the same position as regards costs as if the verdict had been so entered, there is no necessity for a new trial.

Rule discharged.

Solicitors for claimants: *Lewis & Lewis.*
Solicitor for London County Council: *W. A. Blaxland.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1902
Oct. 24.
1903
June 10.

GERSON *v.* SIMPSON.
REITLINGER AND OTHERS, THIRD PARTIES.

Company—Prospectus inviting Subscriptions for Shares—Misrepresentations by Promoters or Directors in Prospectus—Contribution between Wrong-doers —Action for Fraudulent Misrepresentation — Third-party Procedure— Directors Liability Act, 1890 (53 & 54 *Vict. c.* 64), *ss.* 3, 5.

Where two co-promoters of a company join in the issue of a prospectus inviting subscriptions for shares in the company, with knowledge that a statement contained in that prospectus is untrue, and damages are recovered by a person induced to take shares in the company by that statement in an action for fraudulent misrepresentation against one of them, he is entitled to contribution from the other under s. 5 of the Directors Liability Act, 1890.

THIS was an action by the plaintiff, who was a stockbroker in Paris, to recover damages from the defendant for alleged false representations contained in the prospectus of a gold mining company.

The statement of claim, so far as material, was as follows: it stated that, at the time of the issue of the prospectus thereinafter mentioned, the defendant was a promoter of a company registered on August 21, 1895, under the Companies Acts, and called the Gem of Murchison Gold Mine, Limited, and that he was also the chairman and a director of the said company; that a prospectus of the company dated August 14, 1895, was on or about that date issued, inviting subscriptions for shares in the company; that the said prospectus contained certain statements (which were set out in the statement of claim) (1); that the said statements were false to the knowledge of the defendant, and were made fraudulently by him to induce the plaintiff to take shares in the company; that the plaintiff was induced by the said statements to apply for and accept shares in the company, in respect of which he paid to

(1) It is not thought necessary for the purposes of the point of law in respect of which the case is reported to set out the statements complained of or the detailed facts in relation thereto, which were very lengthy and complicated.

C. A. 1903

GERSON v. SIMPSON.

the company the sum of 5000*l.*; and that the shares were of no value, and the plaintiff lost the said sum of 5000*l.*

The defendant obtained leave to issue and serve third-party notices, claiming contribution, under the Directors Liability Act, 1890, s. 5, from persons named respectively Reitlinger, Oppenheim, and Lippmann, on the ground that, the first-named having been a co-promoter, and the others co-directors, of the company with the defendant, they had respectively authorized the issue of the prospectus. The third-party notices having been served accordingly, an application was made to Jelf J. at chambers on behalf of Oppenheim to set aside the third-party notice served on him. The learned judge refused the application. Against this refusal Oppenheim appealed. (1)

1902. Oct. 24. *Haldinstein*, for the appellant. The defendant cannot have any right to contribution from the third party in this case. The action as set forth in the statement of claim is the old common law action for deceit, and not the new cause of action given by the Directors Liability Act, 1890, s. 3, sub-s. 1. The effect of that sub-section, so far as material to this case, is that a right to recover compensation is given to persons who have subscribed for shares in a company on the faith of a prospectus inviting subscriptions for shares, against directors or promoters, or others who have authorized the issue of the prospectus, in respect of loss or damage occasioned by untrue statements contained in the prospectus, without its being necessary to prove fraud on the part of the defendant, unless it is proved, "(*a*) with respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did,

(1) By the Directors Liability Act, 1890, s. 5, "Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment."

up to the time of the allotment of the shares, ... believe that the statement was true." The provisions of s. 5 of the Directors Liability Act, 1890, are confined to persons who have "become liable to make any payment under the provisions of this Act." The action here being one of deceit, if the defendant becomes liable to pay damages, his liability will arise under the common law, and not under the Act. In the 6th edition of Lindley on the Law of Companies, vol. i. p. 123, the following passage will be found with regard to the effect of s. 5: "It will be observed that the right of contribution is limited to persons liable to make any payment under the provisions of this Act; it would therefore seem that, if the plaintiff brought an action for damages for deceit against one or some only of the persons liable to him, and did not proceed under this Act, the defendant would not be entitled to contribution under s. 5." The well-known legal proposition laid down in *Merryweather* v. *Nixan* (1) that there is no contribution between tortfeasors has been held to apply only to cases where the act done is clearly illegal in itself, and it would not apply to cases where the party claiming contribution could not be supposed to have known that the act which he was doing was, under the circumstances, illegal: see per Collins M.R. in *Moxham* v. *Grant*. (2) In the case of the common law action of deceit, the defendant, if the cause of action is proved against him, must, ex necessitate rei, have known that he was doing an illegal act. In the case of the new cause of action under s. 3 of the Directors Liability Act, 1890, the defendant would not know that the statement made was false, and therefore the provision of s. 5 giving him contribution in respect of his liability under the Act is only in conformity with the general law.

Muir Mackenzie, for the defendant. The Directors Liability Act, 1890, s. 5, covers both untrue statements in a prospectus which are made with knowledge that they are untrue, and also untrue statements in a prospectus which, though not made with such knowledge, are made without reasonable belief in their truth. The Act covers both what was actionable

(1) (1799) 8 T. R. 186; 16 R. R. 810. (2) [1900] 1 Q. B. 88, at p. 93.

C. A. 1903

GERSON v. SIMPSON.

before its passing, and what is made by it actionable de novo. A false statement made fraudulently must necessarily be made without reasonable belief of its truth. Therefore, when an action is brought in respect of untrue statements in a prospectus, alleging that they were untrue, and also that they were fraudulently untrue, the case is within the Act. No doubt so far as the statements were fraudulently untrue, the action would have lain independently of the statute; but a person who, as a director, or as having authorized the issue of the prospectus, would be liable, if sued separately, under the Act, because he could not shew that he reasonably believed the truth of the statements made, will be liable to make contribution as between the defendant and himself under s. 5. In such cases the statute takes the case out of the doctrine of *Merryweather* v. *Nixan* (1), and provides that there shall be, with regard to joint tortfeasors, contribution as in cases of contract.

Haldinstein, for the third party, did not reply.

EARL OF HALSBURY L.C. I have no doubt that the order was perfectly right. The question is whether or not under the circumstances there could be a right to contribution. To this question the statute itself, to my mind, gives an answer; and if I may say so, without disrespect to the draftsmen of other statutes, it states with unusual clearness that, with reference to this particular class of tort, and to this class of persons, namely, co-promoters and co-directors, who have issued a prospectus as in the present case, the ordinary rule that there shall be no contribution between tortfeasors shall not apply, but the rights of the parties shall be treated as though it were a question of contract, and not of tort. The result is that there is a right to contribution in this case, and that decides the whole matter. I think the appeal should be dismissed.

COLLINS M.R., ROMER L.J., and MATHEW L.J. concurred.

Appeal dismissed.

(1) 8 T. R. 186; 16 R. R. 810.

The third parties having entered appearances, an order was made that pleadings should be delivered as between the defendant and them, that they should be at liberty to appear at the trial and take such part as the judge should direct, and that their liability to make contribution should be tried at the trial of the action, or subsequently thereto, as the judge at the trial should direct. Statements of claim were thereupon delivered by the defendant to the third parties, who denied liability to make contribution.

The action came on for trial before Wills J. and a jury. It appeared from the evidence that the defendant and Reitlinger were co-promoters of the company. The prospectus containing the statements alleged to be untrue appeared to have been sent by the defendant to Reitlinger, and by him handed to the plaintiff. The defendant set up by way of defence (inter alia) that the document in question was only a draft of a proposed prospectus, and differed from the prospectus which was finally issued, and that Reitlinger was never authorized by him to issue it, or to shew it to the plaintiff or to any one for the purpose of inviting subscriptions for shares in the company. The evidence having been taken in the action, it was arranged that the learned judge should first sum up and take a verdict in the action, and that the claims for contribution against the third parties respectively should then be dealt with seriatim. The judge, having summed up in the action, in substance, left to the jury the questions whether the statements in the prospectus in respect of which the action was brought were communicated to the plaintiff with a view to induce him to act upon them with the sanction of the defendant, whether any of them which were material were false to the knowledge of the defendant, and whether such false statements had a material effect in inducing the plaintiff to take shares in the company. The jury answered all these questions in the affirmative, and assessed the damages at 4750*l.*

The claim of the defendant for contribution from Reitlinger was then tried, and, in answer to questions left by the learned judge to the jury, they found that one of the statements in

C. A. 1903

GERSON v. SIMPSON.

question was a fraudulent misstatement, and that it must have been known by Reitlinger.

The claims of the defendant for contribution from Oppenheim and Lippmann respectively were then dealt with, and the jury found a verdict in favour of those third parties.

The learned judge upon the findings of the jury gave judgment for the plaintiff against the defendant for 4750*l.*, and for the defendant against Reitlinger for half that sum, and he subsequently ordered that Reitlinger should pay the costs of the third-party notice, half of the costs which the defendant would have to pay to the plaintiff in the action, and half of the costs incurred by the defendant to his own solicitors in the defence of the action.

Reitlinger subsequently gave notice of an application for judgment or a new trial. (1)

1903. June 10. *Stewart-Smith, K.C.*, and *A. Sims*, for the third party, Reitlinger. They contended that the verdict of the jury against Reitlinger was not justified by the evidence.

The defendant was found by the jury to have known that the statements in the prospectus were untrue. He was therefore liable at common law for deceit. At common law there is no contribution between joint tortfeasors: *Merryweather* v. *Nixan*. (2) Therefore, assuming that the third party joined with the defendant in making a fraudulent representation in the prospectus, the defendant could not at common law obtain contribution from him. The sole question is whether the defendant is entitled to contribution from the third party under the 5th section of the Directors Liability Act, 1890. It is submitted that that section only applies to the case of a defendant, who, not being liable at common law, becomes liable under the Act, which by s. 3, sub-s. 1, creates a liability for untrue statements made in a prospectus without fraud, where those statements are made without reasonable grounds for belief

(1) There was also a similar application by the defendant against the plaintiff which was unsuccessful, and which is not reported inasmuch as the decision related only to questions of fact.

(2) 8 T. R. 186; 16 R. R. 810.

in the truth of them. If it were otherwise, a promoter or director who had himself originated the fraud, and had fraudulently procured the insertion of a false statement in a prospectus, could recover contributions from co-promoters or co-directors, who without fraud on their own part had been led by him to acquiesce in the insertion of the statement. This could hardly have been intended.

[COZENS-HARDY L.J. In that case could the fraudulent co-director be heard to say as against the others that they had not reasonable grounds for believing in the truth of the statement?]

The statement might be such that the making of it by the fraudulent party would not be a reasonable ground for believing it.

[COLLINS M.R. In this case the jury found that the third party knew the statement to be untrue. Is not this question really concluded by the previous decision of this Court in this very action?]

On that occasion the question was whether the third party notice should be allowed to be given. It is submitted that at that stage the only question was whether primâ facie there might be a claim to contribution, and it was not necessary to decide finally as to the construction of the statute. At that stage, the facts not being known, it was impossible to say whether the defendant's liability, if any, was for fraud at common law, or under the statute for making a representation which was untrue without reasonable grounds for believing it. It is submitted that, upon the statement of claim, it was open to the plaintiff to prove either cause of action; and, if the plaintiff had recovered under the statute, and not for deceit at common law, the defendant might have had a claim for contribution under the statute. Therefore at that stage it would have been clearly wrong finally to exclude the claim for contribution. It is submitted that the learned judge should not have ordered the third party to pay half of the costs payable by the defendant.

[COLLINS M.R. Those costs were incurred in resisting the claim upon which the third party's liability depended, and, if

C. A. 1903

GERSON v. SIMPSON.

the defence had been successful, he would have had the benefit of it.]

C. A. Russell, K.C., and *Muir Mackenzie* (*J. A. Simon* with them), for the defendant, were not called upon to argue.

COLLINS M.R. I think the question argued by the counsel for the third party is concluded by the previous decision of this Court presided over by the Lord Chancellor. That was a decision in this very case, the foundation of which was the action for deceit brought by the plaintiff. The question then discussed, and which, I think, we intended to decide, was whether, if the plaintiff succeeded in that action, a claim for contribution by the defendant would lie against the third party. Our judgment, therefore, appears to me to be a decision on the very point which the counsel for the third party now seeks to raise. There was ample evidence in my opinion to justify the finding of the jury against the third party. The result is that he was a joint tortfeasor with the defendant under circumstances in which he is liable to make contribution under s. 5 of the Directors Liability Act, 1890.

MATHEW L.J. and COZENS-HARDY L.J. concurred.

Application dismissed.

Solicitors for defendant: *Stephenson, Harwood & Co.*

Solicitors for third party Oppenheim: *Gilbert Samuel & Co.*

Solicitors for third party Reitlinger: *Steadman, Van Praagh & Gaylor.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1903
June 16.

In re A SOLICITOR.

Solicitor—Allegation of Professional Misconduct—Inquiry—Report of Committee of Incorporated Law Society—Right of Complainant to be heard by Court—Necessity of appearing by Counsel—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.

Sect. 13 of the Solicitors Act, 1888, by which an application to strike the name of a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their findings in the form of a report to the High Court of Justice, provides that any person, who but for the Act would have been entitled to apply to the Court to strike a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, shall still be entitled so to apply, and "shall be entitled to be heard, if the society brings the report of the committee before the Court":—

Held, affirming the decision of a Divisional Court, that such an applicant could not be heard in person, but must appear by counsel.

Ex parte Pitt, (1833) 2 Dowl. 439; 39 R. R. 734, followed.

APPEAL from the decision of a Divisional Court (Lord Alverstone C.J., Wills J., and Channell J.) (1)

Applications had been severally made by one Trueman, the appellant, and others, that a solicitor might be required to answer allegations of professional misconduct contained in several affidavits. The committee of the Incorporated Law Society, having heard the applications and the evidence, found, with regard to the charges made by the appellant, that the charge of professional misconduct was not made out, but, with regard to the other charges, they reported that the solicitor had been guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

The report of the committee was brought by the Incorporated Law Society before the Divisional Court, who by their judgment exonerated the solicitor from the charge of professional misconduct in respect of the charges on which the committee had found against him.

On the report being so brought before the Court, the appellant

(1) [1903] 1 K. B. 857.

C. A. 1903

A SOLICITOR, *In re.*

claimed to be heard in person under s. 13 of the Solicitors Act, 1888, with regard to the charges which he had made against the solicitor. The Divisional Court held that he could not be heard in person on those charges, and refused to hear him. Against this refusal he appealed. (1)

The Appellant in person. Sect. 13 of the Solicitors Act, 1888, gives a right to a person, who has made a charge against a solicitor, to be heard in person upon the report of the committee being brought before the Court. The case of *Ex parte Pitt* (2), upon which the Divisional Court relied, was decided long before the passing of the Solicitors Act, 1888, and it is submitted that it is not an authority as to the construction of s. 13. The object of now claiming to be heard is not to ask that the respondent should be struck off the rolls or called upon to answer further the charges made, but that the committee should amend the form of their report. (3) [He cited *In re Lilley*. (4)]

The respondent, the solicitor, who appeared in person, was not called upon to argue.

COLLINS M.R. For the reasons given by the Lord Chief Justice and Wills J. in the Divisional Court, I think that the appellant's contention is wrong, and that this appeal therefore fails. The case which the appellant has endeavoured to make here is not altogether the same as that which he made in the Court below. It is obvious, from the report of the argument

(1) A preliminary objection to the appeal was taken by the respondent on the ground that the order appealed against was interlocutory, and, therefore, by virtue of the Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1, no appeal would lie without leave obtained from the Divisional Court or the Court of Appeal, and that no such leave had been obtained. The Court, however, reserved their decision on this point, until they had heard the whole case, and, as will be seen, it ultimately became unnecessary to decide the point, as the Court were against the appellant on the merits, but the Court intimated that they must not be taken to have decided it in the appellant's favour.

(2) 2 Dowl. 439; 39 R. R. 734.

(3) It is not thought necessary for the purposes of this report to go into details as to the amendment which the appellant desired to have made in the form of the report, or his reasons for it.

(4) [1892] 1 Q. B. 759.

and the judgments in the Court below, that the appellant there claimed to be heard in support of the charges he had made against the solicitor. So far as the appellant was endeavouring to do by means of the modern machinery provided by the Solicitors Act, 1888, what, under the old practice, would have been done by a motion to strike the solicitor off the rolls, or to call upon him to answer the matters contained in an affidavit, I think it is quite clear that that can only be done by a person through counsel representing him. I do not think the old practice in that respect is affected by the Solicitors Act, 1888. If a person were merely seeking to be heard with regard to an application against him for costs, it would be different; but it is obvious that what the appellant was seeking to do was to prefer charges against the solicitor with a view to his being struck off the rolls, or called upon to answer the allegations contained in an affidavit, a matter with regard to which, as I have said, a person can only be heard through counsel. If there were anything in the point as to the form of the report, I do not think that the appellant can be allowed on appeal to this Court to alter the ground on which he sought to be heard in the Divisional Court, and so to improve his position. I think therefore that the appeal must be dismissed.

MATHEW L.J. It is clear that in the Divisional Court the appellant sought to appeal from the decision of the committee of the Incorporated Law Society on the charges made by him against the solicitor. The Divisional Court, rightly I think, declined to hear him unless he were represented by counsel. This case appears to me to have afforded a good example of the great importance of maintaining the old practice by which applications of this kind against solicitors could only be made through counsel.

COZENS-HARDY L.J. I am of the same opinion.

Appeal dismissed.

E. L.

[IN THE COMMERCIAL COURT.]

1903
April 27.

ALEXANDER *v.* STEINHARDT, WALKER & CO.

Assignment of Debt—Equitable Assignment—Assignment by Letters from Assignor to Debtor and to Assignee—Bankruptcy of Assignor before receipt of Letters.

A firm of merchants in South America, being indebted to the plaintiff, consigned a quantity of ores to the defendants, the agents of the South American firm in England, and instructed them by letter to sell the ores and to pay to the plaintiff the balance of the proceeds remaining after payment of a specified sum to another creditor; they also wrote to the plaintiff advising him of what they had done. Before either of the letters arrived in England the firm in South America became bankrupts, and the syndic in the bankruptcy telegraphed instructions to the defendants which amounted to a revocation of the directions given in the letter of the consignors as to the disposal of the proceeds of the sale of the cargo:—

Held, that upon the posting of the letters in South America there was a binding equitable assignment of the balance of the proceeds to the plaintiff which remained unaffected by the supervening bankruptcy of the consignors.

ACTION tried in the Commercial Court by Bigham J.

The action was brought to recover the balance of the proceeds of sale of certain copper ores shipped to the defendants by a firm of Walker & Co., of Antofagasta, in Chili. It appeared that in the year 1901 the plaintiff, who carried on business at Manchester as Jaffé & Sons, was a creditor of Walker & Co. to a large amount for goods sold, and that for a considerable time he had been pressing for a reduction of the amount of their debt. On April 30, 1902, Walker & Co. shipped certain copper ores on board the *Selma*, a bill of lading in respect of them being signed on the same date. On May 3 Walker & Co. sent the bill of lading to the defendants together with a letter, the material part of which was as follows: "We have the pleasure of handing you herewith bill of lading and pro formâ invoice for 554 sacks concentrates and 36 sacks precipitates, 590 sacks, 63 tons, which we have shipped to your consignment to Liverpool, and which we shall thank you to dispose of at the best possible prices. Out of the

proceeds of this consignment, which we value at about 800*l.*, we shall thank you to pay over for our account to Messrs. Bohl Gebrüder & Co., of Hamburg, the amount of 400*l.*, and the balance, whatever it is, to Messrs. Jaffé & Sons, likewise for our account." This letter was received by the defendants on June 5. On the same day (May 3) Walker & Co. wrote to the plaintiff as follows: "We have before us your favour of 4th February, and have now the pleasure of advising you that we are sending a parcel of copper ores to Messrs. Steinhardt, Walker & Co., of yours, and have instructed them that out of the proceeds of the same they are to place in your hands for our account the sum of 200*l.* more or less." The plaintiff, on receipt of this letter on June 5, wrote to the defendants, asking for a cheque. On May 13 Walker & Co. had become bankrupts in Chili, and one Longe was appointed syndic or trustee in the bankruptcy; the letters of May 3 from Walker & Co. to the plaintiff and defendants respectively had not then reached England. On May 20 Longe sent a cablegram to the defendants directing them to deliver the metal ex *Selma* to the Tarapaca Bank, in effect revoking the directions contained in Walker & Co.'s letter of May 3. The ores were subsequently sold by the defendants, and the balance of the proceeds, amounting to 91*l.* 9*s.* 5*d.*, was paid into court under an order of Kennedy J.

Leck (*C. A. Russell, K.C.* with him), for the plaintiff. The plaintiff was assignee in equity of the balance of the proceeds of the sale of the ores and is entitled to recover in this action. Instructions given by Walker & Co. to their agents alone could no doubt have been revoked, but they wrote also to the plaintiff, and the two letters together constitute a good equitable assignment. In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund: *Burn* v. *Carvalho*. (1) That case is very similar in its facts to the present, for the act of bankruptcy, upon which the assignors were subsequently

(1) (1839) 4 My. & Cr. 690, 702; 48 R. R. 213, 216.

1903

ALEXANDER v. STEINHARDT, WALKER & Co.

adjudicated bankrupts, was committed before the receipt of the letter which was held to constitute a valid equitable assignment. In the present case Walker & Co. could not have themselves revoked the assignment, had there been no bankruptcy, and the syndic had no greater power of revocation than they had themselves.

Cohen, K.C. (*Wood Hill* with him), for the defendants. There was no effective equitable assignment at the time of the bankruptcy, and therefore either Walker & Co. or the syndic in their bankruptcy could revoke the instructions given to the defendants. The mere posting of the letter by Walker & Co. was insufficient. Posting a letter is no doubt a sufficient acceptance of a previous offer where the offer has been accompanied by an express or implied request for an acceptance by post; but the mere posting of an offer, which is very similar to the present case, has no effect until the offer is received and acted upon. In order to make this alleged equitable assignment binding there should have been a communication from Walker & Co. received by the plaintiff and the defendants before the bankruptcy of the assignors. The letter from Walker & Co. to the plaintiff does not amount to an order to pay the plaintiff out of the funds in the hands of the defendants; it is a mere piece of information given to the plaintiff, and does not bring the case within the doctrine laid down in *Burn* v. *Carvalho* (1) and *Rodick* v. *Gandell*. (2) [He also cited *Scott* v. *Porcher*. (3)]

BIGHAM J. I have no doubt whatever that the intention of Walker & Co. was to assign to the plaintiff a portion of the debt owing to themselves which would arise on the sale of the consignment of ore by the defendants. In my opinion they not only had that intention, but they carried it out by writing these two letters, one to the defendants directing them to pay to the plaintiff the balance of the proceeds of the sale of the ore after payment of a certain amount to Bohl Gebrüder & Co., the other to the plaintiff telling him of the instructions that had

(1) 4 My. & Cr. 690; 48 R. R. 213. (2) (1852) 1 D. M. & G. 763.
(3) (1817) 3 Mer. 652; 17 R. R. 161.

been given to the defendants; there was a clear intention to assign, sufficiently evidenced by the letters. In my opinion the case is just the same as if Walker & Co. had inclosed in a letter to the plaintiff a draft at sight on the defendants by way of payment of their debt, and I cannot doubt that the rights of the plaintiff upon that draft would arise as soon as the letter inclosing it was posted. I do not think that any supervening bankruptcy occurring after the posting of the letter would in any way affect what had been done; the rights of the parties are fixed as soon as the letter is in the post. In my judgment, therefore, the effect of this transaction was that as soon as the letter was posted the plaintiff became entitled to the benefit of the assignment which Walker & Co. intended that he should have. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendants: *Davidson & Morriss.*

W. J. B.

1903
May 5.

BAGEL *v.* MILLER.

Partnership—Liability of Estate of Deceased Partner—Action for Goods sold and delivered—Goods ordered in Lifetime of Partner but delivered after his Death—"Debt or Obligation"—Partnership Act, 1890 (53 & 54 *Vict.* c. 39), *s.* 9.

The estate of a deceased partner is not liable in an action for the price of goods sold and delivered where the order for the goods is given in the lifetime of the deceased partner but delivery does not take place till after his death.

APPEAL from a decision of the judge of the Wandsworth County Court.

The action, which was to recover the price of goods sold and delivered, was originally brought in the High Court, but was remitted to the county court. The plaintiff, a boot manufacturer, had for some time had dealings with a firm of boot-sellers trading as Pittam & Co., and consisting of two partners, H. E. Pittam and F. E. Miller; and in 1901, prior to the month of September, the plaintiff had sold and delivered to Pittam & Co. goods amounting to 32*l.* 4*s.* On September 30, October 10, and October 15 of that year three separate orders for goods were given by Pittam & Co. to the plaintiff, amounting in the aggregate to 32*l.* 15*s.*; no date for delivery was specified in the orders, and the goods were respectively delivered on October 25, November 5, and November 8. Meanwhile F. E. Miller, one of the partners, had died on October 18, after the three orders had been given, but before any of them had been executed; the fact of Miller's death was not communicated at the time to the plaintiff, who did not know of it until February, 1902. In 1902 Pittam left the country, and was said to have been last heard of in Demerara. On June 24, 1902, the writ was issued in the present action to recover 64*l.* 19*s.* for goods sold and delivered, the defendants being Rosetta Miller, the executrix of the deceased partner, and Pittam. The action was remitted on July 21, but it was found impossible to serve the defendant Pittam, although the first hearing was adjourned in order that further efforts might be

made to do so. The defendant Miller paid into court, with a denial of liability, the sum of 32*l.* 4*s.* in respect of the goods ordered and delivered during the lifetime of her husband and testator, F. E. Miller, but contested her liability as executrix to pay for goods ordered by the firm before, but not delivered until after, his death. The learned county court judge held that the plaintiff could not recover from the executrix of Miller the price of the goods ordered by the firm in the lifetime of Miller, because the goods in question were delivered to the firm after Miller's death, and gave judgment for the defendant, Rosetta Miller. The plaintiff appealed.

Abinger, for the plaintiff. The county court judge was wrong. The effect of s. 9 of the Partnership Act, 1890, is to preserve the right of a creditor of a partnership against the estate of a deceased partner where there is an existing obligation in the lifetime of the deceased partner, which is unsatisfied at the time of his death. (1) No doubt, as laid down in Lindley on Partnership, 6th ed., p. 621, the estate of the deceased is not liable to third parties for what may be done after his death by the surviving partners, but there was here an obligation existing in the lifetime of the deceased. The county court judge based his decision on *Friend* v. *Young* (2), but that case is distinguishable. In *Friend* v. *Young* (2) there was merely a contract of agency, which was determined by the partner's death; in the present case the order for goods gave rise in the lifetime of the deceased to an obligation on the part of the partnership to take the goods in pursuance of the contract and to pay for them, which obligation was not put an end to by the death.

[LORD ALVERSTONE C.J. How can the obligation to pay for the goods on delivery be said to have existed at the death?]

(1) By 53 & 54 Vict. c. 39 (The Partnership Act, 1890), s. 9: "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

(2) [1897] 2 Ch. 421.

1903

BAGEL v. MILLER.

It arose by reason of the ordinary course of dealing between the parties, which was for the partnership to order goods of the plaintiff, which were manufactured by him and paid for at the ordinary time after delivery. In *Northey Stone Co.* v. *Gidney* (1) it was held that default in payment for goods sold and delivered was part of the cause of action, and this can only be so if payment was part of the original obligation arising under the contract.

Timins, for the defendant. The case of goods ordered before, but delivered after, the death of a partner forms no exception to the general rule as to the liability of a deceased partner's estate. The obligation to pay for goods not yet delivered was not in existence in the lifetime of the deceased. To succeed in an action for goods sold and delivered, the plaintiff must prove delivery according to the contract—that is, to the partnership as it existed when the contract was made. In the present case this action could not have been maintained against the partnership at the date of the death, for there was no obligation at that time to pay for goods not yet delivered. Under such circumstances as the present there are in substance two contracts—one with the partnership as it existed before the death, the other with the partnership as it was after the death—and it is only the latter in which there can be any obligation to pay, for it is the only one in respect of which there has been delivery. [He cited *Reuter & Co.* v. *Sala*. (2)]

LORD ALVERSTONE C.J. I am of opinion that the appeal of the defendant fails. The action is brought to recover 64*l*. 19*s*., the price of goods sold and delivered, of which goods to the amount of 32*l*. 4*s*. had been delivered before the death of Miller, but the remainder had not been delivered until after that date, although in fact ordered before it. No question arises in the case of a right to equitable relief, or of proceedings in equity against the estate of a co-partner on the ground of a right to obtain payment of a debt; nor is it a case where a Court is asked to exercise its equitable jurisdiction by an adjustment of

(1) [1894] 1 Q. B. 99. (2) (1879) 4 C. P. D. 239.

accounts or by giving a creditor of a firm rights against the assets of one of the partners; it is simply a claim for the price of goods sold and delivered. In order to justify the plaintiff's claim, reliance is placed on s. 9 of the Partnership Act, 1890, which says that after the death of a partner his estate is severally liable for all debts and obligations of the firm incurred while he was a partner, so far as they remain unsatisfied. I agree that there may be an obligation, but not the obligation alleged in the present case. A claim for goods sold and delivered is not a debt incurred while the deceased was a partner, for there was no debt until delivery of the goods; nor was the duty to pay an obligation while the deceased was a partner, and the existence of some other obligation in the lifetime of the deceased is not sufficient to make his estate liable in respect of an obligation which was not incurred in his lifetime. The reasoning in the case of *Friend* v. *Young* (1) shews that where the debt does not accrue in the partner's lifetime it is right to hold that his estate is not liable for goods delivered to the partnership after his death.

WILLS J. I am of the same opinion.

CHANNELL J. I agree. The plaintiff's remedy is not by means of an action for goods sold and delivered.

Appeal dismissed.

Solicitors for plaintiff: *Windsor & Co.*

Solicitors for defendant: *Nicholson Patterson & Freeland.*

(1) [1897] 2 Ch. 421.

W. J. B.

1903
May 8.

MOURMAND AND OTHERS *v.* LE CLAIR. PROVINCIAL UNION BANK, CLAIMANTS.

Bill of Sale—Form in Schedule, Deviation from—Repayment by Instalments—Omission of Monetary Denomination—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale to secure a loan of 70*l.* and interest at 1*s.* in the pound per month stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date in each month:—

Held, that as, having regard to the amount of the monthly interest, the bill of sale could only be paid off if the repayments were at the rate of 7*l.* per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven," and was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882.

APPEAL from the decision of the judge of the Greenwich County Court in interpleader proceedings.

The plaintiffs having recovered judgment and issued execution against the defendant, the goods seized under the execution were claimed by the Provincial Union Bank as grantees under a bill of sale made by the execution debtor. The bill of sale, which was partly printed and partly in writing, witnessed that "in consideration of the sum of seventy pounds now paid to the grantor by the grantee, the receipt of which the grantor hereby acknowledges, he the grantor doth hereby assign unto the grantee and his assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of seventy pounds and interest thereon at the rate of one shilling in the pound per month. And the grantor doth further agree and declare that he will duly pay to the grantee the principal sum aforesaid together with the interest then due by monthly payments of seven" [*sic*] "on the twenty-fifth day of every month succeeding the date of these presents, the first payment to be made on the twenty-fifth day of September next."

The county court judge held that it was impossible to

gather from the bill of sale the amount of the payments intended to be inserted, the necessary calculation being only possible if it were once known by what date the principal and interest were to be repaid, and that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act, 1882, and was therefore void. The claimants appealed.

H. Reed, K.C. (*Haydon* with him), for the claimants. The bill of sale is in accordance with the form in the schedule to the Bills of Sale Act, 1882, and is good; it is not vitiated by the accidental omission of a word after the word "seven." At common law evidence would have been admitted to explain the uncertainty (if any), and there is nothing in the Act to prevent a business document like a bill of sale being construed in a business sense. The ordinary course of construction must be adopted and the document considered as a whole, and the principal being seventy pounds and the monthly interest seventy shillings, the bill could never be repaid by monthly instalments of seven shillings; the only word that can make the provision for repayment sensible is "pounds." In *Grannell* v. *Monck* (1) the year of repayment was not inserted, though the days of the month were; and it was held that the date of repayment was sufficiently stated, and that the time of payment should be read as being the specified days next ensuing the date of the bill of sale. And where in the obligatory part of a bond the word "pounds" was omitted, though it appeared elsewhere in the instrument, it was held that the word might be supplied: *Coles* v. *Hulme.* (2)

F. O. Robinson, for the execution creditors. The county court judge was right in holding that this bill of sale was not in accordance with the form in the schedule. The result of the authorities is that, though there need not be absolute verbal accordance with the form, nothing characteristic must be omitted: per Lord Macnaghten in *Thomas* v. *Kelly*. (3) The omission in the provision for repayment of any word of

(1) (1889) 24 L. R. Ir. 241. (2) (1828) 8 B. & C. 568; 32 R. R. 486.
(3) (1888) 13 App. Cas. 506, at p. 520.

1903

MOURMAND v. LE CLAIR.

monetary denomination not only renders it impossible to say what is the amount of the instalment, but also what the time of repayment is to be. The case of *Grannell* v. *Monck* (1) is not an authority, for there the bill of sale may be said to have been in accordance with the form, because only one particular year was mentioned throughout the document. Such an omission, it is true, would not invalidate an instrument at common law; but here the omission is of something required by statute to be inserted, and the bill of sale is therefore void. There is on the face of the document an alternative mode of construing the word "seven"; read grammatically it might well mean "seven shillings in the pound per month," for "shilling in the pound per month" are the last preceding words to which the word "seven" can be referred. [He also cited *Parsons* v. *Brand* (2); *Bird* v. *Davey* (3); *Linfoot* v *Pockett.* (4)]

Reed, K.C., was not called on to reply.

LORD ALVERSTONE C.J. I am of opinion that this appeal should be allowed. I think the learned county court judge was misled by observations in some of the cases cited to him as to the necessity of a compliance with the form in the schedule to the Act. The question turns entirely on the meaning to be given to the sentence "will pay to the grantee the principal sum aforesaid, together with the interest then due, by monthly payments of seven." Can it mean that the monthly payment is to be anything else than seven pounds? It is suggested that it can, and if there is a reasonable doubt as to how the money is to be repaid, the statute has of course not been complied with. But looking to the fact that the principal sum secured by the bill of sale is 70*l.*, and that the interest is seventy shillings a month, it seems unreasonable to suggest that repayment by monthly payments of "seven" can mean anything but seven pounds; seven shillings a month would not under the circumstances be repayment at all. Then it is suggested that it may mean that the monthly payments

(1) 24 L. R. Ir. 241.
(2) (1890) 25 Q. B. D. 110.
(3) [1891] 1 Q. B. 29.
(4) [1895] 2 Ch. 835.

are to be at the rate of seven shillings in the pound; but there is no antecedent to shew that such a meaning can be placed upon the words. I think, therefore, that the decision is wrong and that the bill of sale is not void.

WILLS and CHANNELL JJ. concurred.

Appeal allowed.

Solicitor for claimants: *J. G. Lincoln.*
Solicitor for execution creditors: *W. Hood.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1903
May 1.

HARRIS *v.* PERRY & CO.

Negligence—Action for Personal Injuries—Invitation to Travel on Engine—Duty to take Reasonable Care under the Circumstances—Liability for Negligence of Servants.

The defendant was contractor for making a tunnel for a tube railway, and had constructed, for the purpose of carrying out the work, a temporary line on which an electric engine ran. This engine was used to draw trucks containing the excavated material to a spot where it could be brought to the surface. It was not fitted for passengers, and the defendant had directed that no one should be allowed to ride on it but the driver and a guard. It had, however, been used to carry officials in the employment of the defendant and of the railway company, with the knowledge and concurrence of the defendant's representative. The plaintiff was an inspector of works appointed by the engineer of the railway, and he accepted from the defendant's timekeeper, who was riding on the engine, an invitation to be conveyed by it to his destination. An accident happened while the plaintiff was on the engine, and he sustained injuries. In an action to recover damages from the defendant in respect of these injuries, the jury found that the plaintiff was on the engine for his own convenience, but with the permission of the defendant's representative, and that the accident was due to the negligence of the defendant's servants:—

Held, that the defendant must be taken, through his representative, to have permitted the plaintiff to ride on the engine, and that his liability was that of a person who undertakes the carriage of another gratuitously; that the duty in such a case is that the care exercised must be reasonable

C. A.
1903
HARRIS
v.
PERRY & Co.

under the circumstances; that there was evidence of such a failure of due care on the part of the defendant's servants as would make him responsible for damage arising therefrom; and that the plaintiff was entitled to judgment.

APPLICATION for a new trial or that judgment should be entered for the defendant in a case tried before Wills J. with a jury.

The action was brought to recover damages for personal injuries sustained by the plaintiff, and alleged to be due to the negligence of the defendant, who traded under the name of Perry & Co. The defendant was the contractor for the making of a portion of a tube railway from Waterloo to Baker Street. The plaintiff was one of the inspectors appointed by the engineer of the railway. At the time when the plaintiff was injured the tube had been completed from Waterloo to the neighbourhood of Baker Street, at which place the work of excavation was going on. For the purpose of the work the defendant had laid down a contractor's railway for removing the earth from the point where it was excavated to a shaft by which it could be brought to the surface and removed. By the side of the railway there was a planked footway for the use of inspectors and workmen. The excavated material was placed in trucks, which were drawn by a small electric locomotive, which was not intended for passengers or adapted for their use. It was worked by a driver, and a guard was in charge of it. The plaintiff was on duty inspecting the line, and was proceeding along the wooden platform in the direction of Waterloo when he was overtaken by the engine, on which was one Shaw, a timekeeper in the defendant's service, who inquired of the plaintiff where he was going, and proposed that he should ride there upon the engine. The plaintiff accordingly got upon the engine, which proceeded for a short distance and then ran into a truck that was on the rails, with the result that there was an accident by which the plaintiff sustained serious injuries.

At the trial evidence was given that the defendant had given directions that no person other than the driver and the guard should travel on the engine, but it was proved that the

defendant's workmen and others were in the habit of doing this. A man called Rowell was in the employment of the defendant to supervise the works, and evidence was given that Rowell had sanctioned the use of the engine by the superior officers of the defendant, of whom Shaw, the timekeeper, was one, and that Rowell knew that officers of the company had been invited to travel on the engine.

The questions left to the jury and their answers were: (1.) "Was the plaintiff on the engine with the permission of Rowell?—Yes." (2.) "Was he there for his own convenience or for the benefit of the defendant?—For his own convenience." (3.) "Was the accident due to the negligence of the defendant's servants?—Yes." The jury assessed the damages at 150*l.*, and the learned judge entered judgment for that amount for the plaintiff.

The defendant appealed.

May 1. *Bray*, *K.C.*, and *Herbert Smith*, for the defendant. Upon the findings of the jury the defendant is entitled to judgment. The plaintiff was a mere licensee, and the defendant was under no duty towards him. He got upon the engine for his own convenience and not in the interest of the defendant, and he took upon himself all risks other than those arising from a concealed trap. There are two classes of cases, those which relate to a mere licensee, of which *Gautret* v. *Egerton* (1) and *Ivay* v. *Hedges* (2) are illustrations. The other class of cases arise where there is a common interest, as in *Holmes* v. *North Eastern Railway* (3) and *Wright* v. *London and North Western Railway* (4); but it cannot be said that the present case falls within that class. Further, there was no evidence of negligence, and judgment ought to be entered for the defendant.

Lord Coleridge, *K.C.*, and *Newson*, for the plaintiff. The evidence was that it was the practice for the officials engaged in the tunnel to ride on the engine, and the jury have found

(1) (1867) L. R. 2 C. P. 371.
(2) (1882) 9 Q. B. D. 80.
(3) (1869) L. R. 4 Ex. 254; (1871) L. R. 6 Ex. 123.
(4) (1876) 1 Q. B. D. 252.

C. A. 1903

HARRIS v. PERRY & CO.

that the plaintiff was on the engine with the permission of the defendant's representative. If he was a mere licensee and took all ordinary risks, it cannot be said that it was one of those risks that a trolly should be left on the line, and that the engine should run into it. There was either a trap or such negligence as would entitle the plaintiff to recover in the action. Further, the plaintiff cannot be regarded under the circumstances as a mere licensee, for he was discharging his duty of inspection, which was a matter of interest to the defendant as well as to the engineer who employed him. Lastly, there was evidence of negligence on the part of the defendant's servants. [They cited *Corby* v. *Hill* (1); *Gallagher* v. *Humphery* (2); *Moffatt* v. *Bateman* (3); *Smith* v. *London and St. Katharine Docks.* (4)]

Bray, K.C., in reply.

Cur. adv. vult.

May 29. COLLINS M.R. read the following judgment:—This is a motion by the defendant for judgment or a new trial in a case tried before Wills J. and a special jury. The action was brought for personal injuries occasioned by the negligence of the defendant. The jury answered certain questions submitted to them by the learned judge, and upon their answers he entered judgment for the plaintiff with damages.

The plaintiff was one of the inspectors appointed by the engineer for the tube railway which is now in course of construction from Waterloo to Baker Street. At the time in question the tube had been completed from Waterloo up to the neighbourhood of Baker Street, where the work of excavation was still going on. The defendant, who trades under the name of Perry & Co., was the contractor for the making of a portion of the tube and railway, and was engaged in carrying out the work of excavation at Baker Street. For the purpose of the works he had laid a temporary contractor's railway from Waterloo up to the point where the work of excavation was going on, and he employed in the works a small electric loco-

(1) (1858) 4 C. B. (N.S.) 556.
(2) (1862) 10 W. R. 664.
(3) (1869) L. R. 3 P. C. 115.
(4) (1868) L. R. 3 C. P. 326.

motive, whose function was to draw the excavated material from the works down to a shaft in the neighbourhood of Charing Cross, through which the excavated matter had to be passed up to the surface. This locomotive was not fitted or intended for the carriage of passengers. It was worked by a driver, accompanied by a person whose name was Thacker, and who filled the function of a guard, or "rope-runner," as he is described in the evidence. For the purpose of enabling the work of inspection to be carried on the contractors had placed a wooden platform all along one side of the tunnel, and on the day in question the plaintiff, who had been engaged in inspecting, was proceeding along this platform in the direction of Waterloo. In the neighbourhood of Charing Cross he was overtaken by the locomotive; and one Shaw, a timekeeper in the defendant's service, who was riding thereon, inquired where he was going, and proposed that he should ride with him on the locomotive to his destination. There was on the locomotive, in addition to the driver, the guard Thacker, and Shaw, one other person, so that the plaintiff made the fifth person on an engine which, as I have said, was designed for the purpose of traction of materials only. The plaintiff got upon the engine, which proceeded in the direction of Waterloo. After it had gone about one hundred yards it came in contact with a truck which was standing on the rails, and had upon it rails which had been taken up for the purpose of repairs on the line between Charing Cross and Waterloo, and the plaintiff sustained serious injuries, for which he has brought this action. There were lights along the tunnel at intervals of about twenty-five yards.

The defendant contended that he was under no liability to the plaintiff, on the ground that the plaintiff had got upon the engine without any permission from him, and that he was there at his own risk only and could not hold the defendant responsible for damage, the risk of which he must be taken to have accepted himself. It was proved that the proper business of the engine at the time of the accident was to draw the material and trucks between Baker Street and Charing Cross only, and that it should not have been used at all upon the

C. A. 1903

HARRIS v. PERRY & Co.

Collins M.R.

part of the line between Charing Cross and Waterloo, which was, in fact, at that time undergoing repairs. There was evidence that the defendant had only visited the line himself on one or two occasions, and that he had expressly forbidden any person, other than the driver and guard, to travel upon the locomotive; but it was proved that the defendant's workmen and others were in the habit, notwithstanding this prohibition, of frequently riding upon it. The defendant had a representative called Rowell, whose business it was to supervise generally the underground works which were being carried out by the defendant. There was evidence, from which an inference might be drawn, that Rowell sanctioned the use of the locomotive by the superior officers of the contractor, of whom Shaw was one, for the purpose of transit along the line, and, further, that he knew that those officers invited the officers of the company to travel with them.

The learned judge left to the jury three questions: (1.) Was the plaintiff on the engine with the permission of Rowell? (2.) Was he there for his own convenience or for the benefit of the defendant? (3.) Was the accident due to the negligence of the defendant's servants? The jury answered the first and third questions in the affirmative, and to the second they answered, "For his own convenience." Without admitting that the finding that the plaintiff was a licensee was supported by the evidence, Mr. Bray, for the defendant, insisted that, inasmuch as the plaintiff was at most a bare licensee, there was no evidence that the defendant had in any way fallen short of his duty to him as such so as to justify a finding of negligence causing the accident. I was very much impressed by this argument at the hearing, and was at one time disposed to think that the plaintiff, for whom a platform had been provided as the proper means of locomotion for purposes of inspection in the tunnel, in riding on the engine merely for his own convenience must be taken to have accepted all risks incident thereto. I must deal with the case, however, on the footing of the findings of the jury, unless there was no reasonable evidence upon which they could be supported. It was urged that, the plaintiff being a bare licensee, there was

no higher duty imposed upon the defendant than that he should not set a trap for the plaintiff, as laid down by the late Willes J. in his memorable judgment in *Gautret* v. *Egerton* (1); that there was in this case no evidence of anything of the kind; that the plaintiff himself ought to have known that the line was subject to repair, and that in leaving the truck and rails where they were the defendant's servants had acted quite reasonably, inasmuch as they had no reason to anticipate that the engine which they knew was employed elsewhere on that day would travel over that part of the line, and that they were in fact merely availing themselves of a proper opportunity of carrying out repairs which were necessarily frequent on a temporary line of the nature described. Wills J., in his summing-up, gave the defendant the benefit of this latter contention, and pointed the attention of the jury to the circumstances under which the engine was allowed by those on it to proceed, as it had done, to the place where the accident occurred. I am unable to discover any flaw whatever in the summing-up. I think the learned judge, in his analysis of the evidence, put the facts quite as favourably for the defendant as they were capable of being put; and his exposition of the law leaves nothing to be desired. He suggested that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and I think the cases support this view. But there is evidence in this case that Thacker was the person from whom the driver of the locomotive was bound to take his orders, and that Thacker was aware of the fact that the line had been taken up and was under repair between Charing Cross and Waterloo, and that he did not impart this fact to the plaintiff or the other occupants of the engine, probably having forgotten it for the moment himself. I think, therefore, that, even if the standard of liability were the same as it would have been to a bare licensee merely walking across the defendant's land, there was evidence upon which the jury might have found that a trap within the meaning of the authorities had been set for the

(1) L. R. 2 C. P. 371.

C. A. 1903

HARRIS v. PERRY & Co.

Collins M.R.

plaintiff: see *Corby* v. *Hill*. (1) At all events, I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation: see in the case of goods, *Southcote's Case* (2), cited in *Coggs* v. *Bernard* (3), and the notes thereto. In the case of persons received for carriage, Parke B. says in *Lygo* v. *Newbold* (4): "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." In *Austin* v. *Great Western Ry. Co.* (5) Blackburn J. says: "I think that what was said in the case of *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (6) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." It seems to me that these authorities imply a larger obligation than that of merely not setting a trap: see also, per Baggallay L.J., *Foulkes* v. *Metropolitan District Ry. Co.* (7) The whole subject will be found exhaustively treated with reference to the English and American authorities in Mr. Beven's valuable work on Negligence in Law, 2nd. ed. vol. 2, pp. 1154 et seq. The defendant, therefore, through Rowell, must be taken to have constructively permitted the plaintiff to

(1) 4 C. B. (N.S.) 556.
(2) (1601) 4 Rep. 83 b.
(3) 1 Sm. L. C. 11th ed. p. 173.
(4) (1854) 9 Ex. 302, at p. 305.
(5) (1867) L. R. 2 Q. B. 442, at p. 445.
(6) (1851) 11 C. B. 655.
(7) (1880) 5 C. P. D. 157, at p. 165.

travel on the engine. There was certainly evidence fit for the consideration of the jury on this point. And there was evidence of such a failure of due care on the part of the defendant's servants as to render the defendant responsible to the plaintiff for the damage arising therefrom.

C. A. 1903

HARRIS v. PERRY & Co.

Collins M.R.

I am of opinion that the appeal must be dismissed.

I have to add that Stirling L.J. and Mathew L.J. concur in the judgment that I have read.

Appeal dismissed.

Solicitors for plaintiff: *Gibson, Usher & Co.*

Solicitors for defendant: *Munns & Longden.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1903 *May* 8, 12.

BOUCAS *v.* COOKE AND OTHERS.

Copyright—Photograph—Photograph "made for or on behalf of any other Person for a good or a valuable Consideration"—Photograph taken at request of Sitter—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.

Where a photographer takes a photograph at the request of the sitter upon the terms that the sitter will pay for taking it, or under circumstances which raise an implied promise to pay on the sitter's part, the photograph is "made or executed for or on behalf of any other person for a good or a valuable consideration" within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, and the copyright in the photograph is in the sitter, notwithstanding that the property in the negative, in the absence of any agreement for its purchase, may remain in the photographer.

Pollard v. *Photographic Co.*, (1888) 40 Ch. D. 345, approved.

Melville v. *Mirror of Life Co.*, [1895] 2 Ch. 531, considered, and observations in judgment disapproved.

APPLICATION of the defendants for judgment or a new trial in an action tried before Ridley J. and a common jury.

The plaintiff carried on business as a photographer, and the defendant Cooke was a youth seventeen years of age, known as the "boy preacher." On January 20, 1902, Cooke, accompanied by the defendant Coutts, came into the plaintiff's studio;

C. A. 1903

BOUCAS v. COOKE.

they said that they came from Mr. Charrington (the proprietor of a mission hall where Cooke was preaching) to have a photograph taken of Cooke, which must be of a particular kind as it was required for a block in order to make a reproduction of the photograph for distribution at meetings where Cooke was preaching: it was arranged that the plaintiff should take a silver-print photograph. The plaintiff then took the two defendants inside and took two negatives for the photograph; he knew then that Cooke was the "boy preacher." After taking the photograph, there was a conversation as to purchasing the negative; according to the plaintiff, Cooke said, "If it is good I may buy the negative of you," while Cooke's evidence was that he told the plaintiff that on completion of the order he should require the negative for the sake of the copyright, and that the plaintiff agreed to it. Cooke said in his evidence that he thought he should have to pay 5*l.* or 10*l.* for the negative; nothing, however, was said by either Cooke or Coutts as to the price at which they would buy it. The plaintiff was not paid for taking the photograph; he said in evidence that he did not charge for it because he thought Cooke was a celebrity, and that there was no agreement that he was to take the photograph in the ordinary way and to be paid for copies supplied to Cooke. On the following day the plaintiff sent a silver print of one of the negatives to the defendant Reynolds, a printer, who was to make a block for the purpose of reproducing it; the photograph was sent to Reynolds by direction of the defendants Cooke and Coutts given at the interview with the plaintiff, and when it was sent the plaintiff knew that the defendants intended to use it for making a block. The photograph was approved by Cooke, who gave the plaintiff an order for twenty-four copies, eighteen of which were subsequently delivered; it did not appear from the evidence what was the agreement as to payment for the copies, but the plaintiff said in cross-examination that he expected to be paid for them by Cooke. On January 29 (before the copies had been delivered) Cooke came to the plaintiff's place of business and saw the plaintiff. Cooke asked the plaintiff what price he could do ten or twenty thousand copies for; the plaintiff quoted a price, but the terms were never agreed, and

the plaintiff never got the order. It was suggested that at this interview Cooke told the plaintiff he had no right to copyright the negative; but this was denied by the plaintiff, who said that nothing was then said about the copyright or negative. The plaintiff had in fact copyrighted the negative on January 27, and when the eighteen copies were delivered he sent a message to that effect. The photograph was eventually reproduced by Reynolds, who registered his own print as copyright, and copies were sold at the mission hall; the plaintiff's name was not put on these copies, nor did he authorize Reynolds to put his own name or the word "copyright" on them; the plaintiff never received any money for the use of the picture. Payment for the two dozen photographs was offered to the plaintiff on more than one occasion, but was declined, and when asked in February to send in his account he refused to do so, the reason given both for declining payment and for refusing to send in an account being that the order was not complete. Several interviews took place between the parties with the view to an arrangement of the dispute as to the copyright, but no settlement could be arrived at, and eventually the plaintiff issued the writ in the present action, claiming damages for the alleged infringement of copyright, an injunction, and penalties.

At the trial before Ridley J. and a common jury the plaintiff and the defendant Cooke were the only witnesses called, and the effect of their evidence is summarized above. In summing up the case to the jury the learned judge directed them that the question was whether the authorship or property in the negative was in the plaintiff or in Cooke, and that a man could not make a photograph for or on behalf of another, if the latter was not entitled to have the negative when the photograph was made; he left to the jury the question whether the negative was made on behalf of Cooke for a good and valuable consideration in the sense that it was to be his in any event, or whether it was only to be his if he paid for it. The jury found that the negative was the property of the plaintiff, and assessed the damages at 20*l.* and penalties at 5*l.*, and judgment was given for the plaintiff for those amounts and for an injunction restraining the defendants from further publication of the

C. A. 1903

BOUCAS v. COOKE.

photographs. The defendants appealed, and asked for judgment or for a new trial. (1)

Sir A. J. H. Collins, K.C., and *Trickett*, for the defendants Cooke and Coutts. The plaintiff was not entitled to the copyright in the photograph. The learned judge at the trial thought that the effect of the proviso in s. 1 of the Fine Arts Copyright Act, 1862, was that the copyright belonged to the photographer, unless the negative was sold to the customer, and that, the negative not having been sold to the defendant Cooke, the plaintiff remained the owner of it, and his summing-up of the case to the jury proceeded on that footing. That is not the true construction of the section. It is really the photograph which is the subject of copyright, not the negative by means of which it is produced, and which bears the same relation to it as the type does to the work which is printed by means of it. A negative may be made or executed by the photographer for or on behalf of another person for valuable

(1) By s. 1 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect."

consideration within the meaning of the section, although there is no purchase of the negative by that other person. The common practice in the case of a person who employs a photographer is for the negative to remain the property of the latter, who retains it for the purpose of supplying the customer with any copies of the photograph which he may afterwards require, but the copyright in the photograph does not belong to the photographer. A wholly different class of case is where the photographer requests a celebrity to allow a photograph of himself to be taken gratuitously, as a speculation for the benefit of the photographer, in which case the copyright would belong to the latter. When the section speaks of a negative being made or executed on behalf of any other person for a good or a valuable consideration, it contemplates the first case, that of the ordinary custom. In the second case the photograph is taken for or on behalf of the photographer, not for or on behalf of the sitter. The present case comes within the first class, for the evidence shews clearly that the negative was executed for or on behalf of the defendant Cooke at his request in the ordinary way, and on the understanding that he was to pay for it being taken; it was not a case of the plaintiff requesting Cooke as a celebrity to sit for his photograph in order that the plaintiff might sell copies for his own benefit. The view taken by Kekewich J. in *Melville* v. *Mirror of Life Co.* (1), to the effect that, where it is the intention of the parties that the photographer should keep the negative as his own property, the photograph is not made for or on behalf of the sitter, is erroneous, and cannot be reconciled with the principle laid down by North J. in *Pollard* v. *Photographic Co.* (2)

[They also cited *Ellis* v. *Ogden* (3); *Ellis* v. *Marshall.* (4)]

H. Reed, K.C., and *Turrell*, for the defendant Reynolds, argued to the same effect.

Scrutton, K.C., and *Colam*, for the plaintiff. Upon a correct view of the facts, which are of a very special character, it may be unnecessary to discuss any question with regard to the general relations between photographers and their customers,

(1) [1895] 2 Ch. 531.
(2) 40 Ch. D. 345.
(3) (1894) 11 Times L. R. 50.
(4) (1895) 64 L. J. (Q.B.) 757.

C. A. 1903

BOUCAS v. COOKE.

or with regard to the construction of the proviso in s. 1 of the Act of 1862. Apart from any statutory provision, it has been held that it is an implied understanding arising out of the nature of an ordinary transaction between a photographer and his customer that the photographer shall not multiply copies beyond those which the customer orders. That understanding is quite independent of the question to whom the copyright belongs, and is consistent with its remaining in the photographer, so that he can prevent the multiplication of copies by any one else. *Pollard* v. *Photographic Co.* (1) depends upon that implied understanding, and not upon any question of copyright. Sect. 1 of the Act of 1862 deals with two cases: first, where the negative of a photograph, made before the Act came into operation, is sold or disposed of after that date; and, secondly, where the negative is made or executed for or on behalf of any other person for good or valuable consideration after the commencement of the Act. By the first part of the section the exclusive right of copying, engraving, reproducing, and multiplying the photograph and the negative thereof is primâ facie given to the author—that is, the photographer; then come the words of the proviso on which the defendants rely, followed by words really contradicting part of what has gone before, by providing that the vendee or assignee of the negative shall not be entitled to the copyright unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect. In the case, therefore, of vendees or assignees within the proviso, it appears that, in the absence of an agreement in writing as to the copyright, it may be lost altogether. The section is not easy of construction, but the view taken by the learned judge at the trial was correct, and, unless the effect of the transaction was that the property in the negative passed to the defendant Cooke, the copyright belongs to the plaintiff. A negative cannot be said to be made or executed for or on behalf of a person for valuable consideration, if it is not to belong to him but to the photographer.

(1) 40 Ch. D. 345.

Assuming that the construction of the section relied upon by the defendants is right, the copyright remained in the plaintiff, unless the negative was made or executed on behalf of the defendant Cooke for a valuable consideration. In the first instance Cooke requested the plaintiff to make one silver-print photograph of him that might be reproduced for the purpose of advertising his meetings, nothing being said as to the price; after it was taken Cooke said that he might wish to buy the negative, if it proved good; no agreement, however, for any sale of the negative was made. No doubt there was a subsequent order by Cooke of some additional copies, but he could not agree with the plaintiff as to the terms for the supply of a large number. There is no evidence of any definite agreement for any valuable consideration at the time when the photograph was taken, and the order for additional copies has no bearing on the case.

[COLLINS M.R. The photograph having been taken by the plaintiff at the defendant Cooke's request, would not the law imply a contract to pay as upon a quantum meruit?]

Assuming that to be so, there would only be an implied agreement for the supply of one photograph. The words of the section are not "when any photograph is made or executed for or on behalf of any other person for a good or a valuable consideration." There is no evidence of an implied agreement by which a negative was to be made or executed for or on behalf of the defendant Cooke for a valuable consideration; at any rate, the evidence does not warrant such an implication, and the jury must be taken to have found there was not.

[MATHEW L.J. The photograph cannot be produced without first making the negative, which is part of the process of producing the photograph. If the photograph is made for valuable consideration, the negative is also.]

Assuming that to be so, it does not necessarily follow that the negative was made for or on behalf of the defendant Cooke within the meaning of the section. In the ordinary case of a person going to a photographer and getting his photograph taken, an arrangement is usually made with regard to the remuneration of the photographer, either on the footing that

C. A. 1903

BOUCAS v. COOKE.

so much is paid for the sitting and so much for so many copies, or nothing specially for the sitting, but so much for so many copies, and the inference in such a case may perhaps be reasonably drawn that the negative is made or executed for or on behalf of the sitter. The present is, however, an exceptional case, and, if there was evidence from which the jury might find that the negative was not made or executed for or on behalf of Cooke, the verdict should stand.

Counsel for the defendants were not called upon to reply.

COLLINS M.R. I am of opinion that this appeal should be allowed. The action is brought by a photographer who alleges that the defendants have infringed his copyright in a photograph, and claims an injunction to restrain the breach, and damages; the jury have given a verdict in his favour. The question for us on this appeal is whether there has been misdirection on the part of the learned judge which has resulted in the verdict being wrong, or whether there is reasonable evidence on which it can be supported. It appears that the defendant Cooke, who is known as "the boy preacher," came to the plaintiff's shop accompanied (he being under age) by a responsible person, the object being that there should be a person with him who should vouch the plaintiff's solvency. From the evidence as to what took place upon this occasion, it seems to me to be clearly a case of an ordinary customer coming into a shop in the ordinary way for the purpose of having his photograph taken, between whom and the photographer there was a contract made for a valuable consideration; primâ facie there would certainly be such a contract, unless the photographer could rebut the inference, and the onus of rebutting it has not been discharged by the plaintiff.

That being the effect of the evidence, the learned judge summed up in reference to the statute which declares the law; it is therefore necessary to read the statute in order to apply the summing-up. The statute is in some respects peculiar, but this part of it is comparatively simple.

Sect. 1 provides: [The learned judge read the section.] It is contended on behalf of the plaintiff that the only matter dealt

with by the section is the sale or disposition of the negative, and that the other clause is pleonastic—that is, that it is only another way of speaking of the sale or disposition of the negative. That is the view taken by the learned judge below, who in effect directed the jury that the one test of the right to the copyright was whether the customer had bought the negative; and that, if the negative had been sold or disposed of, the author had no copyright, but the person to whom it was sold would have it. It is said that the evidence shews that in this case the negative was not bought, and that, therefore, the copyright remained in the author, and the plaintiff can sue any person who multiplies copies of the photograph. But that view is, in my judgment, contrary to the express words of the section, and altogether ignores the second alternative, which primâ facie takes the copyright out of the maker of the photograph, and it substitutes for the alternative given by the section a mere purchase of the negative; in other words, it ignores the distinction between the purchaser of the negative and the person for or on whose behalf for a good or valuable consideration the photograph is made. That the statute regarded the latter as different from a mere vendee or assignee is clear from the following words, which deal with the vendee or assignee as different from the other person, and impose conditions on them which they do not impose on him; a clear distinction is thus drawn between the purchaser of the negative and the person for or on whose behalf the photograph is taken for a good or valuable consideration. If we turn to Scrutton on Copyright, where the question is compendiously treated, the learned author says (1): "In the ordinary case of photographs taken for a paying customer the photographer will be restrained from multiplication of copies both on the ground of copyright, if the sitter is registered as proprietor, the photograph being taken on his behalf for a valuable consideration; and even if he is not registered, on the ground of implied contract or confidence. Where the photographer asks for the sitting, and the sitter pays nothing for it or for copies of the photograph, the copyright will clearly be the

(1) At p. 193 (4th ed.).

C. A. 1903

BOUCAS v. COOKE.

Collins M.R.

photographer's, if he is the author as explained above. Where the sitter pays for some copies, though at a reduced rate, the case becomes more doubtful, and each case must turn on its special facts. There may be cases where the copyright is the sitter's, but the photographer has a licence to exhibit and sell copies. The question in each case is: 'Was the negative taken for or on behalf of the sitter for a valuable consideration?' If so, the copyright is the sitter's; if not, it is the author's. And it would seem that if the photograph is taken at the request of the photographer, even though the sitter afterwards pays for copies, it is taken on behalf of the photographer, and the copyright is his." The test there laid down is whether the negative is taken for the sitter for a valuable consideration.

That is a perfectly fair summary of the law; the question is not whether the negative is bought or sold, but whether it is taken for or on behalf of the sitter for a valuable consideration. What is the evidence on this point? It is really all one way; the defendant Cooke came to the plaintiff's shop and asked to have his photograph taken; the photographer took it. Could he sue for his remuneration? It is obvious that he could, for what he did was done upon request and upon an implied promise to pay for it. There must under such circumstances be facts to negative a promise to pay; there are none here. If the defendant was pleased with the photograph, he might like to buy the negative, and it was agreed that he might do so; but that is a very different thing from contracting to buy the negative. This is the point on which the jury were misled; the learned judge in his summing-up treated the contract for valuable consideration as not embracing a contract for value to take the negative in which the defendants might thus acquire the property, and directed the jury that, unless there was a contract to buy the negative, the copyright remained in the photographer. After carefully reading the summing-up, it is clear that he treated the property in the negative as the crucial question on which the copyright depended, but, in my judgment, in so doing the learned judge was dealing with the case under the first branch of the proviso only. The evidence

clearly shewed that the plaintiff's intention was to charge the defendant Cooke for the photograph, and Cooke himself understood that he would have to pay for it, and those facts bring the case within the branch of the proviso dealing with the making of a photograph for or on behalf of a person for a valuable consideration. Following the observations of Kekewich J. in *Melville* v. *Mirror of Life Co.* (1), the learned judge made the test whether the sitter had arranged with the photographer for a consideration to buy the negative—in other words, he made the property in the negative the sole test of the rights of the parties, and the jury were of opinion that the negative was the property of the plaintiff. Looking at what happened in *Melville* v. *Mirror of Life Co.* (1), I do not think that in the present case the learned judge can be said to have been really following the decision of Kekewich J., by which he considered himself to be bound, although no doubt he followed certain observations in the judgment. No doubt upon the facts of the case the judgment of Kekewich J. was right; but in the Court of Appeal we are entitled to ask ourselves whether the observations in his judgment were sound in law, and I am of opinion that they were not: they were contrary to the language of the whole section. The section does not necessarily involve the purchase of the negative by the customer, but gives him the same rights as if he had purchased it. I am clearly of opinion that in the present case there has been misdirection.

But the question remains whether we should send the case back for a new trial or whether it is evident that the verdict ought to be only one way, and that judgment ought to be entered for the defendants—in other words, whether there was any reasonable evidence that the contract between the parties was other than an ordinary contract between photographer and customer for the taking of a photograph. I am of opinion that there is no such evidence. The point that makes the difficulty is that, where a photographer solicits a celebrity to have his photograph taken without making any charge for the actual taking of the photograph, the right of multiplication of

(1) [1895] 2 Ch. 531.

C. A. 1903

BOUCAS v. COOKE.

Collins M.R.

the photograph primâ facie belongs to the photographer. That is, no doubt, an element which has to be considered. But here the sitter came in the ordinary course, bringing his friend with him, and there seems no evidence that this was other than a bargain for taking the sitter's photograph for a valuable consideration; if that is so, the law is absolutely clear, and there must be judgment for the defendants.

STIRLING L.J. I entirely agree with what has been said by the Master of the Rolls both as to the state of the law and on the question of misdirection. The law on this subject is in my opinion correctly stated by North J. in *Pollard* v. *Photographic Co.* (1) That was the ordinary case of a photographer taking a photograph at the request of the sitter, and on the terms that he should be paid for taking it; there the copyright, as North J. pointed out, is in the sitter, although the legal property in the negative remains in the photographer, and although (as the learned judge held) part of the bargain was that the photographer was not at liberty to sell copies or to make use of the negative without the authority of the sitter. But the case becomes totally different when the photograph is taken by the photographer at his own request for his own use, and without any bargain with the sitter as to payment. All the decided cases, with one exception, are consistent with the law as laid down by North J., among them being *Ellis* v. *Ogden* (2) and *Ellis* v. *Marshall.* (3) The only case which seems to conflict with those decisions is that of *Melville* v. *Mirror of Life Co.* (4), before Kekewich J.; but in that case the photograph was taken at the photographer's own request, and not at that of the sitter, and there was no payment by the sitter. On those facts the case was rightly decided, but observations were made by the learned judge in the course of his judgment which, read literally, support the view taken by Ridley J. in the present case. Kekewich J. said: "a man cannot be said to make a photograph for or on behalf of another, when that other is not entitled to have the negative of the photograph

(1) 40 Ch. D. 345.
(2) 11 Times L. R. 50.
(3) 64 L. J. (Q.B.) 757.
(4) [1895] 2 Ch. 531.

when made. My conclusion therefore is that, though the photograph was of Crossland, yet as the negative was not made or executed for or on behalf of him, the proviso has no application to the present case." If those remarks are to be taken apart from the particular circumstances of the case and as an absolute statement of the law, I am unable to agree with them, though I think that the decision on the particular facts was correct; I agree with the view of North J., and with the view taken in the other decisions to which I have referred. In the present case the learned judge has in my opinion given too much weight to the mere legal title to the negative in the photographer's hands, and not enough weight to the fact that the photograph was taken at the request of the sitter and for valuable consideration, and that the latter would have a right to control the use of the negative by the photographer. I have felt some hesitation as to whether the case should not be sent back for a new trial before another jury, but on the whole I assent to the view that judgment should be entered for the defendants.

MATHEW L.J. I agree that judgment must be entered for the defendants, and that there is no need for submitting the case to another jury, the law being perfectly clear. What is the complaint which is made of the summing-up? Substantially it is that the learned judge followed expressions of opinion of Kekewich J. in *Melville* v. *Mirror of Life Co.* (1) From that case the learned judge gathered that the only true test of ownership of the copyright by the sitter was the purchase of the negative, and it was said that as the negative had not been bought the copyright was in the photographer. But the true test of ownership of the copyright is to be found in the Act of Parliament, and the words of the section are plain: "When the negative of any photograph shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright

(1) [1895] 2 Ch. 531.

C. A. 1903

BOUCAS v. COOKE.

Mathew L.J.

thereof, unless it be expressly reserved to him by agreement in writing." There was no reservation in the present case, and the facts bring it within the Act of Parliament. That is clear from the evidence of the plaintiff himself, which is a description of an ordinary transaction between a sitter and a photographer. It was necessary that a negative should be taken, and in ordinary transactions it is taken for a valuable consideration. If a person comes to be photographed, the photographer is as well entitled to be paid for his work as a bootmaker would be, and that in the present case the photograph was taken for a valuable consideration is abundantly made out. But it was suggested that the sitter was a celebrity, and the photograph was intended to be extensively distributed. The evidence is that the defendant Cooke came to the plaintiff's establishment, and required a special print to be made from the negative with a view of repeating it: that is agreed. It is clear that the photographer foresaw that the photograph was to be repeated, and it is contended that somehow or other he is possessed of the copyright, and that he can prevent the customer from using the silver print. It is clear, however, that the plaintiff, having produced the negative for a good and valuable consideration, in the absence of the agreement mentioned in the section can be prevented from dealing with it. In my opinion, sufficient attention was not paid to the language of the statute in the summing-up in the Court below, and this appeal must be allowed.

Appeal allowed. Judgment for defendants.

Solicitors for plaintiff: *C. V. Young & Son.*

Solicitors for defendants: *Beckingsale, Greenwood, Tucker & Cross.*

W. J. B.

HARMAN *v.* AINSLIE.

1903
May 13.

Landlord and Tenant—Lease—Negative Covenant—Proviso for Re-entry.

A lease of a house contained a covenant by the tenant to pay the rent, rates, and taxes, and also a covenant not to use the premises for certain specified purposes without the consent of the lessor, and it contained a proviso that "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed" the lessor might re-enter:—

Held, that, as the lease contained both affirmative and negative covenants, a proviso for re-entry in the above form must be understood as applying only to breaches of the former.

TRIAL before Wright J. without a jury.

By an indenture of lease dated July 8, 1885, Mrs. S. Popplesdorf demised a house No. 76, High Street, Southend, to Edwin C. Alderman for the term of twenty-one years at the rent of 60*l*. The lessee covenanted to pay the rent reserved, land tax, tithe rent-charge, and all other rates, taxes, and outgoings. He also covenanted that he would not "use or suffer the said premises or any part thereof to be used for any art, trade, or business whatsoever except the trade of an outfitter without the licence or consent in writing of the said lessor for that purpose first obtained." He also further covenanted that he would not assign or underlet the premises or any part thereof without the consent of the lessor. The lease contained a proviso that "if the said lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed, then the said lessor may re-enter upon the said premises."

On February 7, 1887, Mrs. Popplesdorf gave her licence in writing to E. C. Alderman to assign the lease to one Comber, and by the same document gave her consent "that hereafter any art, trade, or business may be carried on in the said premises except that of a photographer, hairdresser, or tobacconist." And by an indenture of even date Alderman, in pursuance of the said licence, assigned the lease to Comber.

1903

HARMAN v. AINSLIE.

In July, 1897, the plaintiff purchased the reversion from Mrs. Popplesdorf.

By an indenture dated October 2, 1899, Comber assigned his lease to the defendant. Subsequently the defendant suffered a part of the premises to be used for the trade of a baker and confectioner. The plaintiff claimed that this constituted a breach of the covenant in the lease of July, 1885, and brought the action to recover possession of the premises under the proviso for re-entry.

It was contended for the defendant that the licence given by Mrs. Popplesdorf in February, 1887, to use the premises for trades other than that of an outfitter enured for the benefit of the defendant, and that there was consequently no breach of the covenant; and, further, that if there was a breach, the proviso did not authorize the plaintiff to re-enter for a breach of a negative covenant.

Duke, K.C., and *J. Samuel Green*, for the plaintiff.

Hume Williams, K.C., and *R. J. W. Neville*, for the defendant.

The arguments of counsel and the authorities relied upon sufficiently appear from the judgment.

WRIGHT J. The clause in the lease which I am called upon to construe provides that if the lessee shall "commit any breach of the covenants hereinbefore contained and on his part to be performed" the lessor shall be entitled to re-enter. It seems to me that the preponderance of authority tends to shew that, where the lease contains both affirmative and negative covenants, a proviso for re-entry in that form applies only to the former. If the words had been simply "commit any breach of the covenants hereinbefore contained," and the clause had stopped there, it would have applied to negative as well as to affirmative covenants. If, again, the words had been "commit any breach of the covenants hereinbefore contained and on his part to be performed and observed," I think that, according to the preponderance of the authorities, they would have applied to the negative covenants. In *Croft* v.

Lumley (1), where the words were "shall make default of or in the performance of all or any of the other covenants hereinbefore contained, which on his part are or ought to be performed, observed, and kept," it was held obiter that the proviso did apply to the breach of a negative covenant: per Bramwell B. (2), and per Lord Wensleydale. (3) In *Barrow* v. *Isaacs* (4) Lord Esher, in answer to the contention that the stipulation for re-entry did not apply to the breach of a covenant not to underlet without licence, said: "I think that proposition is disposed of, because the word 'observe' as well as 'perform' has been put in the stipulation, though," he adds, "I doubt whether it was necessary to put that word in." He thus left it open whether the word "perform" is sufficient. But I think I ought to prefer what is said by Fry J. in *Evans* v. *Davis* (5): "If the matter had rested simply on the words of the clause at the end of the agreement as to non-performance of the covenants, probably I should have felt myself bound to hold that Lord Coke was right, if I may use such language with regard to Lord Coke, in saying that the word 'performance' is not applicable to negative covenants, and that, therefore, the clause of re-entry could not be ex vi termini extended to a negative covenant, a covenant not to do certain things." In *West* v. *Dobb* (6), where the proviso was for re-entry "in case the lessees should fail in the observance or performance of the covenants on their part," Kelly C.B., though he declined to decide the point, expressed a doubt whether the proviso referred to negative covenants. Then, in *Timms* v. *Baker* (7), where the words were "perform and keep all and singular the covenants . . . . on his part . . . . to be observed, performed, and kept," Lopes J. held the proviso wide enough to cover breaches of negative covenants, but he added: "If the word 'perform' alone had been used, I think the case would have been very different." I think, on the balance of authority, I ought to

(1) (1858) 6 H. L. C. 672.
(2) 6 H. L. C. at p. 705.
(3) 6 H. L. C. at p. 743.
(4) [1891] 1 Q. B. 417.
(5) (1878) 10 Ch. D. 747, at p. 761.
(6) (1870) L. R. 5 Q. B. 460.
(7) (1883) 49 L. T. 106.

1903

HARMAN v. AINSLIE.

Wright J.

hold that in the proviso in the present case the language used points solely to affirmative covenants. Indeed, it looks to me as if the words "and on his part to be performed" had been introduced into the proviso for that very purpose; for if it was not intended thereby to limit the application of the proviso the introduction of those words was wholly unnecessary.

That of itself is enough to dispose of the case. But there is another point which has been raised by the defendant with which I ought to deal. The covenant alleged to have been broken is a covenant that the lessee "shall not during the term use or suffer the said premises or any part thereof to be used for any art, trade, or business whatsoever except the trade of an outfitter without the licence of the lessor." It was contended by the defendant that the consent given in 1887 by the plaintiff's predecessor, Mrs. Popplesdorf, to the then tenant, "that hereafter any art, trade, or business may be carried on in the said premises except that of a photographer, hairdresser, or tobacconist," was a sufficient licence to the defendant as the assignee of the lease. I think that contention is right. I do not know of any authority which limits a consent of that kind to the particular tenant in possession of the premises at the time of the consent given. There will be judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Leslie, Antill & Arnold.*
Solicitor for defendant: *C. E. Soames.*

J. F. C.

SALT *v.* SCOTT HALL.

1903
May 25.

Local Government—By-law—Reasonableness—Rural District—Discretion of Justices—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

A rural sanitary authority, invested with urban powers, made a by-law under s. 157 of the Public Health Act, 1875, prohibiting the erection within their district of a new building not constructed of brick, stone, or other hard and incombustible material:—

Held, that the fact that the by-law did not reserve to the sanitary authority any power to exempt exceptional cases from its operation, as for instance where the building was remote from other dwellings and had all its rooms on the ground floor, did not make the by-law unreasonable and void; but that if, upon the hearing of an information for a breach of the by-law, the justices were of opinion that, having regard to the purposes for which the by-law was made, it was not necessary to enforce it under the special circumstances of the case, they might in the exercise of their discretion under s. 16 of the Summary Jurisdiction Act, 1879, notwithstanding that a breach of the by-law had in fact been committed, dismiss the information or impose only a nominal penalty.

CASE stated by justices of Anglesey.

On October 8, 1902, an information was laid by the appellant, as inspector of nuisances for the district, against the respondent for having built in the parish of Llanfaelog, in the rural district of Valley, a new building or bungalow without causing it to be inclosed with walls of brick, stone, or other hard and incombustible materials, contrary to the by-laws of the rural sanitary authority of the Holyhead Union applicable to the said parish. The by-law, the breach of which was complained of, was as follows:—

"11. Every person who shall erect a new building shall cause such building to be inclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together—

"(*a*) with good mortar compounded of good lime and clean, sharp sand or other suitable material; or

"(*b*) with good cement; or

"(*c*) with good cement mixed with clean, sharp sand."

At the hearing the following facts were proved or admitted:

1903

SALT v. SCOTT HALL.

The structure in question was erected by and was the property of the respondent, and was intended to be used in the summer months as a dwelling-house or bungalow. The foundation was of stone, the chimney and breastings of brick, and the rest of the building of wood except the roof, which was of slate. All the rooms of the bungalow were on the ground floor, and the windows were French windows. The parish of Llanfaelog, where the said building is situate, is a rural parish adjoining the sea. The bungalow is an isolated building in the country, the two nearest houses thereto being respectively 450 and 200 yards distant therefrom. Bungalows of a similar character are frequently built, and there are five such bungalows erected in the Valley district. A bungalow made of wood similar to the one erected by the respondent is as healthy as it would be if made of bricks or stone or other hard and incombustible materials. The by-laws adopted by the Valley Rural District Council were in the form of a set of model by-laws prepared by the Local Government Board for urban districts. The said by-laws were properly made and confirmed by the Local Government Board in accordance with the Public Health Acts.

It was contended for the respondent that by-law 11 was unreasonable in a thinly populated parish like Llanfaelog, inasmuch as it absolutely prohibited the erection of wooden bungalows under any circumstances whatever and however isolated, and did not reserve any discretion to the rural district council to permit the erection of such bungalows under any circumstances.

The justices held that the by-law was unreasonable, and dismissed the information subject to a case.

The question for the opinion of the Court was whether they were bound to convict the respondent of the offence with which he was charged.

Davenport, for the appellant. The justices were wrong in holding that by-law 11 was unreasonable. It is copied from No. 11 of the model by-laws issued by the Local Government Board. In *Badley* v. *Cuckfield Rural District Council* (1) the

(1) (1895) 59 J. P. 582.

validity of this by-law was upheld, though no doubt the decision was there directed to another point.

Bryn Roberts, for the respondent. The model by-law from which the present by-law was copied was one of a series headed "New Streets and Buildings," and was meant to meet the case of buildings in an urban district. In a town it is reasonable to require new buildings to be made of incombustible material, in order to prevent the spread of fire to adjoining houses; but it is unreasonable to extend such a provision to a house in a country district remote from other habitations. Here the nearest dwelling-house was 200 yards away. The case of *Heap* v. *Burnley Union* (1) supports this contention. There a rural sanitary authority with urban powers made a by-law prohibiting the keeping of swine within 50 feet of a dwelling-house. The Court drew a distinction between a populous town and a rural district, and held that what was reasonable in the one was not necessarily reasonable in the other; and they held that the by-law was unreasonable and bad. The present by-law contains no exemptions, and gives no dispensing power to the surveyor. Inferentially the Legislature has indicated that a by-law of this kind is not necessary for a rural district, for s. 157, under which it was made, in terms only applies to urban authorities.

[CHANNELL J. The Legislature may have meant, not merely to prevent the spreading of fire from one house to another, but also to prevent loss of life in the house in which the fire breaks out.]

That danger could not arise in the case of a bungalow like this, in which all the rooms were on the ground floor and all the windows were French windows.

Davenport, in reply.

LORD ALVERSTONE C.J. It would no doubt be more satisfactory if in by-laws of this kind there were reserved to the local authority a discretionary power to exempt exceptional cases from their application. But we are asked to say that because this by-law does not contain any such discretionary

(1) (1884) 12 Q. B. D. 617.

1903

SALT v. SCOTT HALL.

Lord Alverstone C.J.

power it is unreasonable and void. I do not think we can go as far as that. The consequences of such a decision would be very serious, as having a far-reaching application to many other by-laws in different parts of the country. Moreover, in *Badley* v. *Cuckfield Rural District Council* (1) a by-law in identical terms with the present was treated as reasonable. The justices have asked us whether they were bound to convict the respondent of the offence with which he was charged. It is true that the by-laws contain no exempting power, but the proceedings are taken under the Summary Jurisdiction Acts, and under s. 16 of the Summary Jurisdiction Act, 1879, the justices have the power, if they think the circumstances of the case are such as to warrant such a course, to dismiss the summons. I think the case should go back to the justices, with the intimation that the by-law is not unreasonable, but that they are entitled to exercise a discretion, and to deal with the matter as they think fit on the merits of the case.

WILLS J. I agree.

CHANNELL J. I am of the same opinion. It seems to me that all by-laws relating to the construction of buildings ought to have something in the nature of a dispensing power, enabling the local authority or its surveyor or other officer to say that a particular building is of an exceptional character, and that the hard and fast rules laid down by the by-laws as to the mode of construction ought not to apply to it. But I think it would be most mischievous to hold that the absence of such a dispensing power necessarily made the by-law bad. The Court does not now readily interfere to set aside as unreasonable and void by-laws which a local authority has deliberately adopted, for it recognises that the local authority is itself the best judge as to whether a particular by-law is required in its district or not. And this need not necessarily entail any hardship, because the justices may be trusted to exercise the powers which they have got of dealing with

(1) 59 J. P. 582.

exceptional cases in an exceptional way, either by inflicting a nominal penalty, or, if they think the offence of too trifling a nature to be dealt with under the Summary Jurisdiction Acts, dismissing the summons altogether. It is because the justices have those powers that it is unnecessary to hold that by-laws which omit upon the face of them to provide specially for exceptional cases ought to be set aside as unreasonable.

1903
SALT
v.
SCOTT HALL.
Channell J.

Case remitted to the justices.

Solicitor for appellant: *L. Jones, for T. R. Evans, Holyhead.*
Solicitors for respondent: *Horne & Birkett, for Gold Edwards & Co., Denbigh.*

J. F. C.

BELL (SURVEYOR OF TAXES), APPELLANT *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED, RESPONDENTS.

1903
May 13, 28.

Revenue—Income Tax—Sched. D—Bank—Purchase of Business of another Bank—Establishment of Branch—Succession to Business—Business "set up and commenced"—5 & 6 Vict. c. 35, s. 100, Sched. D—First and Second Cases, rule 4; First Case, rule 1.

The respondents were a banking company with a head office in London at which the general affairs of the company were transacted and with numerous branches, the working of which was regulated and supervised from the head office by a board of directors and a general manager. The ultimate profits divisible among the shareholders were the result of the trading of the company as a whole, irrespective of the profit or loss arising from a particular branch. The respondents acquired by purchase the whole of the business and the premises of a country bank, and opened the premises as a branch of their business; the profits, if any, made at that branch were merged in the general profits of the respondents' business, and it was impossible to ascertain the proportion of increase or decrease, if any, in those profits arising from the purchase. The respondents had not previously to the purchase had a branch or carried on any business in the town where the premises of the country bank were situate. Assessments for income tax for the three years following the purchase were made on the respondents on their own returns at their head office based on the average profits of the whole of their business for the three preceding years, and the assessments included the profits, if any, made by the new branch, but it was impossible to differentiate between those profits and the general profits of the respondents' business. Additional assessments were made

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

on the respondents for the said three years on assumed profits made by them, based as to the first of the three years on the average profits of the country bank for the three years preceding the purchase, and as to the second year on one-third of the profits of the two years preceding the purchase, and as to the third year on one-third of the profits of the year preceding the purchase:—

Held, that there had not been a succession by the respondents to the business of the country bank within rule 4 of the first and second cases, Sched. D, s. 100, of 5 & 6 Vict. c. 35; that the new branch was not a business which had been set up and commenced within three years of the years of assessment within rule 1 of the first case; that the business carried on by the respondents at the premises of the country bank was their former business enlarged by the acquisition of the country bank; and that the respondents were, therefore, not liable to the additional assessments.

CASE stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the general purposes of the Income Tax Acts.

The facts set out in the case were as follows:—

At a meeting of the Commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the City of London, the National Provincial Bank of England, Limited, appealed against an assessment of 4818*l.* beyond their assessment on their own return of 228,493*l.* for the year ending April 5, 1900, against an assessment of 3218*l.* beyond their assessment on their own return of 299,768*l.* for the year ending April 5, 1901, and against an assessment of 1634*l.* beyond their assessment on their own return of 300,253*l.* for the year ending April 5, 1902, under Sched. D to the Act 16 & 17 Vict. c. 34, in the following circumstances: The National Provincial Bank of England, Limited (hereinafter called the respondents), which was established in the year 1833, and was subsequently registered under the Companies Acts with a nominal authorized capital of 15,900,000*l.*, on which 3,000,000*l.* had been paid, had since its foundation transacted banking business at the head office in Bishopsgate Street, in the City of London, and at a large number of branch establishments in London and various parts of England and Wales, such branch establishments now numbering 199. The County of Stafford Bank, Limited, was established in the year 1836 under the name of the Bilston

District Banking Company, with a deed of settlement. In 1873 the company was registered under the Companies Act, 1862, as a company with unlimited liability, and the name of the company was changed to that of the County of Stafford Bank. In 1882 the company was incorporated as a company with limited liability under the name of the County of Stafford Bank, Limited, the registered capital being 800,000*l.*, divided into 20,000 shares of 40*l.* each. The head office and banking house of the company was at Wolverhampton, and under the regulations registered as the articles of association the business of the company was to be carried on there, and at such other places as the board might from time to time appoint. The company was also empowered to establish such branch banks, agencies, and local boards in the United Kingdom as the directors thought proper. As a matter of fact, however, the business was only carried on at Wolverhampton, and the powers conferred on the company under these regulations of establishing other business branch banks, agencies, and local boards were not exercised.

By agreements made respectively in February, 1899, and March, 1899, the whole of the business of the County of Stafford Bank, Limited, which had carried on business for some sixty-two years previously on the same premises and without any branches, its business premises, furniture, and fixtures, and such of its assets and liabilities as were provided by the agreements and shewn in the balance-sheet annexed to the latter of the said agreements, was and were, as from the close of business on December 31, 1898, purchased by the respondents for the sum of 225,000*l.* under and upon the terms of the agreements. The business of the County of Stafford Bank was carried on as usual, but for the benefit and at the expense of the respondents until the close of the business at 4 P.M. on March 5, 1899, when the premises were closed. On the following morning, namely, March 6, the same premises were opened as their Wolverhampton branch by the respondents, who had never previously had any branch, or carried on any business, at Wolverhampton. The manager and the whole of the former staff were taken over by, and had, subject to necessary and

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

ordinary changes, since continued to remain there in the employ of the respondents. Business had since been carried on by the respondents at the same premises. None of the books of the County of Stafford Bank, Limited, were taken over or continued in use by the respondents, except that the ledgers, being found to be in the same form as those used by the respondents, were continued in use by them to the end of the current year. In such of the pass-books as were continued in use a notice was inserted by means of a rubber stamp to the effect that as from January 1, 1899, the account was with the respondents, but all new cheque-books and pass-books were issued in the name of the respondents. As provided by the latter of the said agreements, the County of Stafford Bank was not dissolved until six months after the date thereof, and the liquidators did not make up their final account or distribute the purchase-money until a considerable period had elapsed.

From December 31, 1898, the profits, if any, earned at and by the respondents' Wolverhampton branch merged in and formed part of the general profits of the respondents without any distinction as to source or origin of profit, and there were no means for ascertaining whether there were any profits or the proportion of increase or decrease, if any, in the profits of the bank which had arisen from the business, &c., so purchased as aforesaid. The ultimate profits divisible among the shareholders of the respondents were the result of the trading of the company as a whole, including the head office and all the branches, irrespective of the profit and loss arising from the business done at the head office or any particular branch. At and from the head office of the respondent company the general affairs of the company were transacted, and the working of the branches was regulated and supervised by the board of directors and general manager through various departments. All profits were received and dealt with by the head office. There were many classes of expenditure which were not and could not be definitely allocated in any way, such as general management and departmental and establishment expenses which could not be definitely attributed to any particular branch.

The general assessments of the respondents for the years

ending April 5, 1901, and April 5, 1902, included some portion of the profits made by their Wolverhampton branch, if any were made, namely, the assessment for the year ending April 5, 1901, the profits on average for the preceding year 1899, and the assessment for the year ending April 5, 1902, the profits on average for the preceding years 1899 and 1900; but as the accounts were merged in the general accounts of the appellant bank it was impossible to differentiate between the profits made by the Wolverhampton branch of the respondents and the general profits of such bank from the time the County of Stafford Bank was taken over. There were no means or accounts which would enable the respondents to make a return under the Income Tax Acts of the profits of their Wolverhampton branch (if any), or apply for the benefit of s. 133 of the 5 & 6 Vict. c. 35, in respect to such profits if less than the estimate. Profits were made by the County of Stafford Bank from the business at Wolverhampton for each of the three years ending December 31, 1896, 1897, and 1898 respectively, when the accounts were made up, as follows: 1896, 4801*l.*; 1897, 4750*l.*; 1898, 4904*l.*; and the assessments of 4818*l.*, 3218*l.*, and 1634*l.* respectively for the years ending April 5, 1900, April 5, 1901, and April 5, 1902, appealed against were assumed profits made by the respondents, based on an estimate, for the first year on the average of the profits of the County of Stafford Bank of the three preceding years—namely, 1896, 1897, and 1898—after the usual allowances for dividends, rents, &c., on which income tax had been paid by way of deduction; based for the second of the said years on one-third of the profits of the years 1897 and 1898; and based for the third of the said years on one-third of the profits of the year 1898. An assessment was made on the County of Stafford Bank, Limited, for the year ending April 5, 1899, based on the average profits of the three preceding years ending December 31, 1897, and the duty was paid by the said company. There was no assessment for any one of the years ending April 5, 1900, April 5, 1901, or April 5, 1902, on the County of Stafford Bank, Limited.

Assessments on their own returns had also been made for

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

the years ending April 5, 1900, April 5, 1901, and April 5, 1902, respectively, on the respondents at their head office in London, on amounts based on the average of the profits of their whole business for the three years ending respectively on December 31, 1898, December 31, 1899, and December 31, 1900, as shewn by the published accounts and balance-sheets for each period of three years respectively; and the duty on such assessments was duly paid by the respondents.

The respondents duly appealed against such assessments to the Commissioners of Income Tax for the City of London.

On the hearing of such appeals the surveyor of taxes contended that the respondents were liable to the additional assessments in order to cover such estimated profits, and further contended that there was a succession on the part of the respondents to the business of the County of Stafford Bank, Limited, according to the terms of the fourth rule of the first and second cases, Sched. D of s. 100 of 5 & 6 Vict. c. 35 (1), and that, consequently, the respondents should be assessed to include the estimated profits of the business purchased from the County of Stafford Bank, Limited, estimated upon an average of the profits of the said period of three years respectively of the County of Stafford Bank, Limited.

(1) Fourth rule applying to first and second cases, Sched. D, s. 100, of 5 & 6 Vict. c. 35: "If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners, or such person succeeding to such business as aforesaid, shall prove, to the satisfaction of the respective Commissioners, that the profits and gains of such business have fallen short or will fall short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof."

The respondents contended that the profits, if any, of the business carried on at Wolverhampton during the period covered by such additional assessments could not be made or included in the basis of any assessment against the respondents for that period, which was by the Act limited to the years 1896, 1897, and 1898, during none of which did the respondents carry on any business at Wolverhampton; that such profits, if any, were merged in the general profits of the respondents, and were liable to be extinguished or diminished by reason of losses elsewhere or general expenses; and in any event would, in due course, form part of the basis of assessment. Further, that if the additional assessment was to be allowed the respondents would be doubly assessed on such portion of their profits, if any, as arose from the business purchased from the County of Stafford Bank. Further, in reply to the contention of the surveyor, they contended that the acquirement by purchase of the business of the County of Stafford Bank was not a succession or such a succession as was contemplated by the Income Tax Acts.

The Commissioners were of opinion that there was no succession within the meaning of the fourth rule, also that the business when purchased was not sufficiently, generally or separately, identified after merger in the respondents' business to render the profits, if any, properly subject to separate assessment, and that the respondents were or would be charged with a fair proportion of the profits, and were not liable to be additionally assessed over and above the ordinary assessments on the profits of the National Provincial Bank, and they discharged the assessments accordingly. From this decision the surveyor of taxes appealed.

Rowlatt (*Sir Edward Carson, S.-G.*, with him), for the Crown. The facts of this case bring it within the fourth rule applying to the first and second cases of Sched. D. The respondents have succeeded to the business formerly carried on at Wolverhampton by the County of Stafford Bank, and they have been rightly assessed on the assumed profits derived by them from that business. This is not an ordinary case of

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

the expansion of an existing business resulting from the establishment of a new branch. The acquisition of an entirely distinct business as a going concern is very different from starting a branch business in a new locality. *Ryhope Coal Co.* v. *Foyer* (1) supports the contention of the Crown, because it was there held that where a private partnership was converted into a limited company, the company "succeeded" to the trade of the partnership within the meaning of the fourth rule. [He also cited *Ferguson* v. *Aikin* (2) and *Watson* v. *Lothian*. (3)] But if this is not a case of a succession within the fourth rule, it falls within the proviso to the first rule of the first case under Sched. D, which deals with the case of a business which has been set up or commenced within the period of three years, and the duty payable must, therefore, be computed on the average of the profits from the time when the respondents took over the business of the Stafford Bank.

[*Danckwerts, K.C.* That point was not taken before the Commissioners, and, therefore, cannot be taken now.]

Danckwerts, K.C., and *Paget, K.C.*, for the respondents. The question is entirely one of fact: see the judgments in *Ferguson* v. *Aikin*. (2) If the Commissioners had found as a fact that the respondents, in addition to their business in London, had succeeded to and were carrying on a distinct and separate business in Wolverhampton, there would have been some force in the appellant's argument; but the Commissioners have not done so. What they have found is that the business of the Stafford Bank has been acquired by the respondents and merged in their previously existing business. The position is exactly the same as if the respondents had started a new branch at Wolverhampton. A bank does not carry on a separate business at each of its branches. There is only one business, though that one business may be carried on at different places: *London Bank of Mexico and South America* v. *Apthorpe* (4); *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (5) The respondents have been assessed at their head office in

(1) (1881) 7 Q. B. D. 485.
(2) (1898) 4 Tax Cases, 36.
(3) (1902) 4 Tax Cases, 441.
(4) [1891] 2 Q. B. 378.
(5) [1896] A. C. 31.

respect of the profits of their entire business; they cannot be assessed a second time in respect of the profits of a part of that business. If, instead of starting a new branch, the respondents had given up an old one, the profits of their business would nevertheless have been computed on the average of the three preceding years, and in that case the average would have worked out in favour of the Crown. *Ferguson* v. *Aikin* (1) shews that the fourth rule only applies where there is an identity between the business succeeding and that succeeded to. There a company took over the business of a firm of whisky distillers and blenders, and worked a distillery which had been owned though not worked by the firm, and it was found as a fact by the Commissioners that the company had not succeeded to the business of the firm within rule 4. The Court treated the question as one of fact, and refused to disturb the finding of the Commissioners. There is no identity between the business formerly carried on by the Stafford Bank and that now carried on by the respondents at their Wolverhampton branch. The following passage in the judgment of A. L. Smith L.J. in *Prescott, Dimsdale & Co.* v. *Bank of England* (2) supports this view: "An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either: it must depend upon the nature and character of the businesses amalgamated, and how the amalgamated business was subsequently carried on. In each case it must be a question of fact." The respondents have merely enlarged the locality and extent of their transactions, but they still carry on the same business with its headquarters in London.

Rowlatt replied.

May 28. RIDLEY J. read the following judgment:—This was a case stated by the Income Tax Commissioners for the City of London, raising a question as to the proper assessment of the National Provincial Bank of England under the Income Tax Acts.

It appears that the National Provincial Bank of England

(1) 4 Tax Cases, 36. (2) [1894] 1 Q. B. 351, at p. 364.

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

Ridley J.

(hereinafter called the respondent bank), which was established in 1833 and is now registered under the Companies Acts, has a nominal authorized capital of 15,900,000*l.*, on which 3,000,000*l.* has been paid, and has its head office in the City of London, and numerous branch establishments in London and elsewhere.

By agreements dated February and March, 1899, the respondent bank acquired for 225,000*l.* as from December 31, 1898, the business of the County of Stafford Bank, Limited, which for some years previously had carried on business at Wolverhampton with a capital of 800,000*l.* This County Bank had no branch establishments, although the company had power to establish them. After December 31, 1898, the business of the County Bank was carried on as usual, though for the benefit and at the expense of the respondent bank until March 5, 1899, when the premises were closed, on the following morning to be opened as the Wolverhampton branch of the respondent bank. None of the books were taken over except some ledgers, which, being found to be in the same form as those used by the National Provincial Bank, were continued in use till the end of the current year. All new cheques and pass-books were in the name of the respondent bank. From December 31, 1898, the profits earned at the Wolverhampton branch merged in the general profits of the respondent bank without distinction as to their origin, and it was stated in the case that there are no means of ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of the bank which has arisen from the business so purchased. The general assessments of the respondent bank included some portion of the profit, if any, made by the Wolverhampton branch—that is to say, for the year ending April, 1901, the profits on average for the preceding years 1899 and 1900—but merely as a portion of the general profit, there being no means of differentiating the profits made by the Wolverhampton branch from the general profits, nor to make any return of the profits of the branch as distinguished from the general profits.

In the years 1896, 1897, 1898, the County of Stafford Bank had made profits as follows: 1896, 4801*l.*; 1897, 4750*l.*; 1898, 4904*l.*; and the present additional assessments of 4818*l.* for

1900, 3218*l.* for 1901, 1634*l.* for 1902, are the assumed profits made by the National Provincial Bank calculated for 1900 on the average for the three years preceding; for 1901 on one-third of the profits for 1897 and 1898; and for 1902 on one-third of the profits for 1898. No assessment was made for 1900, 1901, 1902 on the County of Stafford Bank.

It was contended for the Crown that the bank was liable to these additional assessments in order to cover the estimated profits arising from the acquisition of the Stafford Bank; that there was a succession on the part of the National Provincial Bank according to the fourth rule of the first and second cases Sched. D to s. 100 of 5 & 6 Vict. c. 35, and that, therefore, such estimated profits should be calculated on an average of the profits for the said three years respectively of the County Bank. It was also argued in the alternative that the business had been "set up" anew under the first rule of the first case under the same schedule, and that, therefore, the assessment should be computed "for one year on the average of the balance of the profits and gains from the period of first setting up the same." For the respondents it was contended that the business of the County of Stafford Bank was extinguished, and that, therefore, there was no succession to it within the meaning of the rule above quoted; nor was the business set up anew; and that the increase in the business of the bank must be regarded simply as development, so that the profits of the Stafford Bank for 1896, 1897, and 1898 were not to be taken into account. It would seem upon these facts that one or other of the following three inferences must be correct—first, that the business now carried on by the respondents is to be regarded as a new business set up and commenced within the period of the three years preceding the day of assessment, and, therefore, to be dealt with under the first rule applying to the first case in Sched. D. Secondly, that this is a case of succession to a trade, adventure, or concern, and that, therefore, it is to be dealt with under the fourth rule applying to both cases in Sched. D. Thirdly, that the business now carried on by the respondents is the old and former business enlarged by the acquisition of the County of Stafford Bank, but still the old

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

Ridley J.

business, and, not coming within either of these two provisions, is to be assessed simply on the average of three years previous to the date of assessment.

As to the first contention, it appears to me that the case of *Prescott, Dimsdale & Co.* v. *Bank of England* (1) is of importance. In that case a suit was brought to recover from the Bank of England compositions due as was alleged to the plaintiff bank as compensation for the loss of their privilege of issuing their own bank-notes under the Bank Charter Act, 1844. It appears that the plaintiff company was registered in 1890, and that it had acquired the business then carried on by four banks at London, Bristol, Clifton, and Bath, and did accordingly carry on such businesses in its own name, there being no other apparent change, except that the name of the company was substituted for those of the old firms. Cave J., at the trial, thought the case governed by the previous decision of *Capital and Counties Bank* v. *Bank of England* (2), and that the former banks still continued to carry on business; but the Court of Appeal decided that in the true view of the facts the former businesses had ceased and a new one had come into existence. They also distinguished the earlier decision of *Capital and Counties Bank* v. *Bank of England* (2), in which case a bank called the Hampshire Bank had absorbed into itself other banks, and was held (not as a matter of law, but as of fact) to be carrying on, after such absorption, the same business as before. In the present instance the National Provincial Bank is in the same position as was the Hampshire Bank in the *Capital and Counties Bank Case* (2): it has absorbed the business of another bank, and, in my opinion, it would be contrary to that decision to say that it carries on a new business; and I would add that, reading the words in their ordinary meaning, I should, even without that decision, have come to the same conclusion. It follows from this, in my opinion, that this adventure or concern has not been "set up or commenced within the period of three years," and, therefore, the first alternative fails.

But, secondly, is this a case of succession to a trade,

(1) [1894] 1 Q. B. 351. (2) (1889) 61 L. T. (N.S.) 516.

adventure, or concern within the meaning of the fourth rule, applying to both cases? The intention and scope of this rule appear to me to deal with two cases—first, a change of the persons engaged in any trade or profession in partnership together, either by reason of death, dissolution, or admittance of a new partner before the time of making the assessment or within the period for which it ought to be made; secondly, the case where any person shall have succeeded to such trade or profession within that period. In both cases the duty payable is to be computed according to the profits and gains of the business during the respective periods mentioned in that behalf as though no such change or succession has occurred. The change in the partners or the succession of any person to the business is not to alter the assessment, which is to be made on the average of the number of years applicable as though there had been no such change or succession. Thus in *Ryhope Coal Co.* v. *Foyer* (1), where a partnership which had worked coal mines for over five years was incorporated as a limited company, and the company bought the assets and took over the liability and the partners became holders of all the shares, it was held that the company had succeeded to the concern within the meaning of this rule; the association was new, but the concern was old. Now there is, indeed, a sense in which the National Provincial Bank (if it be conceded that the business carried on by the County of Stafford Bank still exists at all) may be said to have succeeded to it. A man succeeds to an estate which devolves upon him although he was previously owner of other and larger estates. But in this rule is the word "succeeded" used in that sense and with that intention? It appears to me that it is not so used, but that it refers to cases where the undertaking or concern is the same, but there has been a change of the partners who carry it on, or a set of new partners. In *Ferguson* v. *Aikin* (2), a company called the "old company" had carried on business as blenders of whisky, wine merchants, and exporters, and had an interest in a distillery, which they did not work. In 1896 a new

(1) 7 Q. B. D. 485. (2) 4 Tax Cases, 36.

1903

BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND.

Ridley J.

company was formed, which took over this business and began to work the distillery. The Commissioners having decided, as a matter of fact, that there was not an identity between the business as carried on by the old company and that carried on by the new, the Court of Exchequer in Scotland determined that the question is one of fact, and that there was nothing to shew that the decision was wrong. Lord M'Laren said: "There may be cases where there is substantial identity, notwithstanding some difference as to the branches carried on, and there may be cases where a new concern carrying on a large business absorbs a small one, and cannot in any legitimate sense be regarded as their successors; but this is a question of fact for the Commissioners." The case of *Watson* v. *Lothian* (1) was also quoted, but it does not seem to me to assist the argument, as it turned on another point. But from *Ferguson* v. *Aikin* (2) it seems to me to follow that the construction of the rule which I am inclined to take is the correct one. The undertaking or concern must, in the hands of the successors, be the same as it was before. Then, assuming that the business of the Stafford Bank still survives, how can it be said that it is now, in the hands of the National Provincial Bank, the same as it was before the change? There is not, indeed, a new business differing in kind from the former, as distilling whisky differs from blending it, yet it seems to be impossible to say that a business of such volume and character as that of the National Provincial Bank is the same as that which was carried on formerly by the local bank which it absorbed. And the words of Lord M'Laren, quoted above, in which he says, "There may be cases in which a new concern carrying on a large business absorbs a small one, and cannot in any legitimate sense be regarded as their successors," appear to be nearly in point; for in that sentence I do not think there is any emphasis on the word "new," which is merely used as meaning a large business independent of the former concern; "new," in fact, as regards it, but not necessarily new under rule 1 of the first case quoted above. If

(1) 4 Tax Cases, 441. (2) 4 Tax Cases, 36.

that is correct, the National Provincial Bank in the present case was a new concern absorbing a small one, but it did not succeed to it.

The third alternative only remains, and I am of opinion that it is the correct view. It may be said that from its adoption it follows that where a bank, as in the present case, acquires by purchase the business of another, the last three years in which the business was carried on escape from the computation which is to be made on the average of the last three years; and that, in the result, the tax is precisely the same as it would have been if the new company had simply started a new branch. But this reasoning appears to be inconclusive; for the question is, How have the rules enacted by s. 100 dealt with the matter? And if they have not provided for those three years to be brought into the computation, that must be the decision of the Court. For these reasons I think the contention of the respondents right, and that the decision of the Commissioners must be affirmed with costs.

Judgment for the respondents.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Wilde, Moore & Wigston.*

F. O. R.

1903
May 28.

EMARY *v.* NOLLOTH.

Criminal Law—Sale of Intoxicating Liquors to Children—Sale by Servant contrary to Instructions of Licensee—"Knowingly allows any Person to Sell"—Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, "every holder of a licence who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only," is made liable to penalties.

Intoxicating liquor was knowingly sold to a child under fourteen in a bottle neither corked nor sealed by a servant of a licensed person contrary to the express orders and without the knowledge of his master, who was himself in charge of the premises at the time of the sale :—

Held, that the licence-holder could not be convicted under s. 2 of "knowingly allowing" a person to sell intoxicating liquor to a child under fourteen in a vessel neither corked nor sealed.

CASE stated by a metropolitan police magistrate.

An information had been laid by the respondent against the appellant under s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, charging that he being a person licensed by the justices for the retail sale of intoxicating liquor within the meaning of the Licensing Acts, 1872 and 1874, did unlawfully and knowingly allow a certain person, to wit, James Barnes, to sell intoxicating liquor for consumption off the premises to Alice Bastard, a person under the age of fourteen years, in a vessel which was not corked and sealed and which contained not less than one reputed pint. Upon the hearing of the information the following facts were proved.

At half-past one o'clock in the afternoon of Sunday, July 13, 1902, Alice Bastard, a child aged nine years, entered the appellant's licensed premises and placed upon the counter in the bar an empty bottle and one penny and a halfpenny to pay for a pint of porter. The bar was crowded with customers at the

time. The appellant, who was then himself in charge of the premises, was present in another part of the bar, but did not see the child and had no knowledge of any intoxicating liquor being sold to her. James Barnes, a barman employed by the appellant, filled the bottle with porter and returned it to the counter, from whence it was taken away by Alice Bastard; the bottle was neither corked nor sealed. The bottle in which the porter was supplied had the appearance of having been sealed on a previous occasion, and it was proved that on all previous occasions on which Alice Bastard had been served with liquor at the appellant's premises she had been served in bottles corked and sealed. The appellant kept posted up in a conspicuous place in the bar a notice in the terms following: "Notice to Employees. Every servant employed at this establishment is expressly forbidden to supply any intoxicating liquors either for consumption on or off the premises to any child who is in his or her opinion under fourteen years of age except in sealed and corked bottles containing not less than one pint." Prior to the sale complained of the appellant had given express instructions to James Barnes similar to the directions contained in the above notice, and had required him to observe and obey them.

The magistrate found that James Barnes, in serving Alice Bastard, was acting within the general scope of his employment as the appellant's barman; and further found as a fact that James Barnes, in breach of the appellant's express orders and without his knowledge, had knowingly sold the said pint of porter for consumption off the premises to a person under the age of fourteen years in a vessel neither corked nor sealed, and which contained not less than a reputed pint; he was also satisfied that the appellant had not connived at the sale.

On behalf of the appellant it was contended that he had adopted all reasonable means to prevent sales taking place upon his premises in contravention of the Intoxicating Liquors (Sale to Children) Act, 1901, and that the sale complained of had been effected while the appellant was himself in charge of the house without his knowledge and in disobedience to his express orders and directions by an employee to whom the appellant

1903

EMARY v. NOLLOTH.

had not delegated the charge or superintendence of the licensed premises, and that accordingly he could not be convicted of the offence with which he was charged. The magistrate was of opinion that this contention was not well founded in law, and that the appellant was liable under the statute under which he was charged for any act done in contravention thereof upon his licensed premises by his servant, provided such act was within the general scope of his employment, and that the circumstance that the servant acted without the appellant's knowledge and in disobedience to his orders afforded no ground of defence.

The question for the opinion of the Court was whether he was right in law in so holding.

Danckwerts, K.C. (*Bruce Williamson* with him), for the appellant. The conviction was wrong. On the facts found in the case the appellant cannot be convicted of "knowingly" allowing the sale by the barman. In the recent case of *Brooks* v. *Mason* (1), where the charge was one of delivering, and not merely of permitting the delivery, it was held that the act of selling or delivering intoxicating liquors to children under fourteen was an act prohibited in itself, but that there was an exception in favour of bottles properly sealed, not in favour of bottles which the licence-holder merely believed to be properly sealed. The decisions under s. 13 of the Licensing Act, 1872, as to permitting drunkenness on licensed premises are entirely in point upon the construction of the new statute. In *Cundy* v. *Le Cocq* (2) the offence charged was sale to a drunken person, and the Court held that the words of the section amounted to an absolute prohibition of such a sale, and that knowledge that the person was drunk was not an element of the offence. In *Somerset* v. *Hart* (3) gaming had taken place upon licensed premises to the knowledge of a servant who was not in charge of the premises, and it was held that the licensee, in the absence of any suggestion of connivance, could not be convicted of suffering gaming under s. 17 of the Act of 1872, and that decision was

(1) [1902] 2 K. B. 743. (2) (1884) 13 Q. B. D. 207.
(3) (1884) 12 Q. B. D. 360.

approved and followed in *Somerset* v. *Wade*. (1) In *Commissioners of Police* v. *Cartman* (2), where the offence charged was selling to a drunken person, the landlord was absent, and his barman, who had been left in charge with orders that no drunken person was to be served, knowingly served a drunken man, and it was held that the landlord was responsible and ought to be convicted. The principle to be extracted from the decisions is that where a licensed person, who has not delegated his authority to a servant, is charged with permitting or allowing an offence, knowledge on his part is essential to a conviction. [He also cited *Worth* v. *Brown*. (3)]

Macmorran, K.C. (*Arthur Gill* with him), for the respondent. The conviction was right. Two offences are dealt with by s. 13 of the Licensing Act, 1872: sale of intoxicating liquor to a drunken person, which is absolutely forbidden, and for which knowledge on the part of the licence-holder is unnecessary, and permitting drunkenness on licensed premises, for which knowledge is necessary. In *Somerset* v. *Hart* (4) Lord Coleridge C.J. said: "I do not say that proof of actual knowledge on the part of the landlord is necessary. Slight evidence might be sufficient to satisfy the magistrates that the landlord might have known what was taking place if he had pleased"; and a similar observation might be made with regard to what took place in the present case. In *Bosley* v. *Davies* (5), which was a conviction for suffering gaming, it was held that constructive knowledge was sufficient, Cockburn C.J. saying, "A man may be said to 'suffer' a thing to be done, if it is done through his negligence." It is true that *Commissioners of Police* v. *Cartman* (2) was a case of sale of liquor to a drunken person; but Lord Russell of Killowen C.J. protested against defeating the object of the section by placing a narrow construction upon it, and he expressed a clear opinion that where the actual direct control of the business was deputed to a servant the licensee was liable for the acts of his servant provided they were within the scope of his employment. The special case no doubt finds that the

(1) [1894] 1 Q. B. 574.
(2) [1896] 1 Q. B. 655.
(3) (1896) 40 Sol. J. 515.
(4) 12 Q. B. D. 360.
(5) (1875) 1 Q. B. D. 84.

1903

EMARY v. NOLLOTH.

appellant was in charge of the licensed premises, but the facts stated shew that he had delegated the charge of this portion of the premises to his servant. The sale was within the scope of the employment of the servant, who was in charge of that part of the premises in which the sale took place; it is immaterial that he was not in charge of the whole. [He also cited *Bond* v. *Evans*. (1)]

Danckwerts, *K.C.* The language of Lord Russell of Killowen C.J. in *Commissioners of Police* v. *Cartman* (2) is irreconcilable with the construction sought to be placed upon it for the respondent; the knowledge of the servant is only treated as the knowledge of the master where the servant is in charge of the business carried on in the licensed premises; there is no suggestion that the servant can be in charge of one part of a bar when the licensee is present in another part of it. In the language of the Court in *Worth* v. *Brown* (3), the servant must be the licensee's agent, not merely for certain purposes only, but his agent in the sense of being his alter ego.

LORD ALVERSTONE C.J. I am of opinion that this appeal should be allowed. No doubt the scope and object of the Act of 1901 is to prevent the sale of intoxicating liquor to small children without taking proper precautions to prevent their being able to get at the intoxicating liquor sold. It has been suggested during the argument that the drafting of the statute is imperfect, but nothing is to be gained by criticizing the language of Acts of Parliament, except to point out a desirable amendment. It is probably a casus omissus that this Act does not in terms include a sale of intoxicating liquor by any person employed on licensed premises, but is confined to a sale by the licensed person himself; now that attention has been drawn to the omission, an amending Act to include a sale by any person other than the licensee can be passed if thought desirable.

We have to consider whether, under the circumstances appearing in the case, a licence-holder who, on the one hand, neither knew of nor connived at the offence, and, on the other

(1) (1888) 21 Q. B. D. 249. (2) [1896] 1 Q. B 655.
(3) 40 Sol. J. 515.

1903

EMARY v. NOLLOTH.

Lord Alverstone C.J.

hand, has not delegated his authority to any other person, can be convicted of an offence against this statute. Under ordinary circumstances an offence implies a mens rea, but there are exceptions, and in this case the question is whether, for the offence created by this statute, the knowledge of the person who is the seller in fact, and who is the agent of the licensee to sell, is sufficient to justify the conviction of the licensee. It would serve no useful purpose to go through the decisions which have been cited to us in argument; but three general principles may be gathered from them. If the offence is prohibited in itself, knowledge on the part of the licensee is immaterial; this principle was acted upon quite recently in *Brooks* v. *Mason* (1), where intoxicating liquor had been sold in a bottle not in fact sufficiently corked but believed to be so, and knowledge was held to be immaterial. Similarly, where there is an absolute prohibition against selling, it is unnecessary to prove knowledge. Then comes the class of case in which the licensee is charged with knowingly allowing, permitting, or suffering an offence to be committed: in those cases knowledge is essential; but it has been held, and this is the second principle to be extracted from the decisions, that if the licensee delegated his authority to someone else, delegating, as my brother Channell said, "his own power to prevent," and the person left in charge commits the offence, the licensee is responsible for permitting it; this is a reasonable and logical view to take, and is necessary in order to prevent the Act of Parliament from being defeated. Then we have, thirdly, the class of case where under the circumstances (as in the present case) there has been no delegation of authority, and the licensee is himself controlling the business and has given direct instructions to the persons in his employ that there is to be no infraction of the provisions of the statute. Of course, if there has been delegation of authority, a prohibition given by the licence-holder may, as has been pointed out in *Commissioners of Police* v. *Cartman* (2) and other cases, be immaterial; but in the present case the licence-holder himself kept charge of the premises, and did not delegate his authority, though his

(1) [1902] 2 K. B. 743. (2) [1896] 1 Q. B. 655.

1903

EMARY v. NOLLOTH.

servant broke his orders. In my judgment, that does not amount to a breach of the law by the licensee. The conviction was therefore wrong, and the appeal must be allowed.

CHANNELL J. I am of the same opinion for the same reasons.

Appeal allowed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitors for respondent: *Wontner & Sons.*

W. J. B.

Applied. *Re* STERN. [1950] 2 All E.R. 160. | *Applied.* *In re* STERN [1950] Ch. 550

1903

June 30.

RUTHER *v.* RUTHER.

Husband and Wife—Separation Order—Adultery of Wife—Liability of Husband for subsequent Weekly Payments—Enforcement of Order—Appeal by Case Stated—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 9, 11.

Applied. READ *v.* READ [1952] P. 119

Where an order for a weekly payment by a husband to his wife is made under the Summary Jurisdiction (Married Women) Act, 1895, and the wife subsequently commits adultery, the husband is entitled under s. 7 of the Act, on proof thereof before a Court of summary jurisdiction, to have the order discharged in spite of a finding by the Court that he has been guilty of conduct conducing to the adultery; and he is not liable to make any further payments to his wife, although the order may not have been in terms discharged by the adjudication as to the wife's adultery.

The decision of a Court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Act of 1895 are in arrear, is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division; but the Court has power to state a case for the opinion of the King's Bench Division upon a point of law arising on the information.

Manders v. *Manders*, [1897] 1 Q. B. 474, distinguished.

CASE stated by the stipendiary magistrate of Merthyr Tydvil.

The facts were as follows:—

On November 16, 1898, an order was made by two justices sitting as a Court of summary jurisdiction at Abergavenny under the Summary Jurisdiction (Married Women) Act, 1895, that the appellant should pay to the respondent, his wife, the weekly sum of 10*s.*

On December 4, 1901, the appellant applied to the Court of summary jurisdiction at Abergavenny for the discharge of the said order on the ground that the respondent had, subsequently to the date of the order—namely, on September 27, 1901—committed an act of adultery. The adjudication of the Court on this application, as appeared by the indorsement upon the said order, was that the respondent had committed adultery on the date alleged, and that the appellant by his wilful neglect had conduced to such act of adultery.

On January 29, 1902, the appellant was by order of the Court of summary jurisdiction at Abergavenny committed to gaol for three months in default of his paying certain arrears under the said order amounting to 55*l.* 10*s.*, being the arrears of the weekly payment for the period of two years seven weeks—namely, from August 7, 1899, to September 25, 1901, and the appellant was imprisoned accordingly. The period of imprisonment terminated on April 29, 1902.

On December 3, 1902, an information was preferred by the respondent before the stipendiary magistrate of Methyr Tydvil alleging that the payments under the order of November 16, 1898, were in arrear to the amount of 18*l.*

A warrant was issued by the magistrate for the apprehension of the appellant, and the appellant was brought before him on January 5, 1903. It was admitted that no payment had been made by the appellant after September 25, 1901; but it was not proved in what way the sum of 18*l.* was arrived at. It was admitted on behalf of the appellant that he was liable to pay, and he was in fact prepared to pay, arrears as between September 25, 1901, and December 4, 1901 (the date of the above indorsement on the order), and costs, if the 18*l.* included any part of these arrears. It was admitted by the respondent that she had committed adultery since the appellant had been committed to prison on January 29, 1902.

It was contended for the appellant that upon proof and adjudication on December 4, 1901, of the adultery of the respondent on September 27, 1901, s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, operated to discharge the order of November 16, 1898, as from December 4, 1901; and,

1903

RUTHER v. RUTHER.

in the alternative, that it was the absolute duty of the Court of summary jurisdiction of Abergavenny to discharge the order, and by the indorsement on the order the Court must be taken to have done so, and that the order was therefore in law discharged, and that the stipendiary magistrate had no jurisdiction in the matter of the respondent's information in respect of arrears after December 4, 1901.

For the respondent it was contended that the order was still in force.

The magistrate held that the order had not been and could not be discharged without an order of the Abergavenny justices or of the Probate, Divorce, and Admiralty Division discharging it. The magistrate, therefore, committed the appellant to prison for one month unless the sum of 18*l.* and costs should be sooner paid.

The question for the opinion of the Court was whether this decision was right in law. (1)

Rowsell (*Warburton* with him), for the respondent. There is a preliminary objection to the hearing of this case. It is a case stated by way of appeal from an order of a magistrate committing the appellant to prison for non-payment of arrears due under the original order. By s. 11 of the Act, 1895, the appeal should have been to the Probate Division: *Manders* v. *Manders*. (2)

(1) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

Sect. 7: ". . . . If any married woman upon whose application an order shall have been made under this Act . . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

Sect. 9: "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

Sect. 11: "Save as is herein provided, an appeal shall lie from any order or the refusal of any order by a Court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice."

(2) [1897] 1 Q. B. 474.

1903

RUTHER v. RUTHER.

[LORD ALVERSTONE C.J. We will hear the case before giving our decision upon the preliminary objection.]

S. G. Lushington, for the appellant. The magistrate had no power to commit the appellant to prison for non-payment of arrears. Sect. 7 of the Act enacts that, on proof of an act of adultery committed by the wife, an order made against the husband for weekly payments shall be discharged. Therefore an act of adultery on September 27, 1901, having been proved, the justices on December 4, 1901, had no jurisdiction but to discharge the order; and they must be deemed to have performed their duty and done so. The indorsement on the order that the appellant had conduced to the adultery is mere surplusage, because s. 7 does not contain any proviso as to the husband conducing to the adultery. The justices appear to have confused s. 7 with s. 6, in which there is a proviso to that effect. The word "shall" in s. 7 is imperative, and it is important to note that by the use of the word "shall" in s. 7 the Legislature has departed from the language used in the previous statutes dealing with this subject; in the Matrimonial Causes Act, 1878, s. 4, and the Married Women (Maintenance in Case of Desertion) Act, 1886, s. 1, the word is not "shall," but "may." [He referred to *Haddon* v. *Haddon*. (1)]

As to the preliminary objection, the appeal is properly brought to this Court. It is not an appeal from an order under the Act of 1895, and therefore does not come within s. 11. The proceedings were by information of the respondent for the purpose of enforcing payment of arrears under an order made under the Act, but the procedure does not depend on the Act of 1895; it is by s. 9 to be the same as in the case of an affiliation order, and it is therefore governed by s. 4 of the Bastardy Laws Amendment Act, 1872. The magistrate issued his warrant for the apprehension of the appellant, and subsequently committed him to prison; but he made no order under the Act of 1895 or otherwise. When a defendant is committed for non-payment of sums due under an affiliation order, no order is made by the magistrate.

Rowsell, for the respondent. The committal was right. The

(1) (1887) 18 Q. B. D. 778.

1903

RUTHER v. RUTHER.

order of November 16, 1898, has never been discharged, and the appellant is therefore still liable to make the weekly payments. Sect. 7 must be read as if the adultery therein referred to were to be subject to the qualifications enacted by s. 6; otherwise an order might be discharged for a reason which would not have prevented it from being obtained in the first instance.

LORD ALVERSTONE C.J. With regard to the preliminary point, I am clearly of opinion that in the circumstances of this case an appeal by way of case stated lies to this Division of the High Court. The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by s. 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. The procedure for enforcing payment is, therefore, regulated by s. 4 of the Bastardy Laws Amendment Act, 1872, which empowers magistrates where an order for payment has not been obeyed, and no sufficient distress can be had, to commit the defendant to prison for any term not exceeding three months. For the respondent reliance is placed upon the case of *Manders* v. *Manders* (1), and it was argued that the appeal ought to be to the Probate Division; but *Manders* v. *Manders* (1) was a case of an appeal from an order on a husband for a weekly payment made under the Act of 1895, whereas in this case the appellant is not appealing against the original order, but from the warrant of the magistrate committing him to prison for non-payment which is issued under the Bastardy Act, and is not an order such as is referred to in s. 11 of the Act of 1895. It is, moreover, quite clear that if the question involved in this case had been raised by certiorari, there could have been no objection to the proceedings. For these reasons the preliminary objection fails.

With regard to the substantial question raised by the case, it appears that in 1898 an order was made under s. 4 of the Act of 1895 for the payment by the appellant to the

(1) [1897] 1 Q. B. 474.

respondent of a weekly sum of 10*s*. In 1901 the appellant had got in arrears with his payments, and a sum of 55*l*. was owing by him. He ascertained that the respondent had committed an act of adultery, and he applied to the justices that the order might be discharged in accordance with s. 7 of the Act. The justices found that the adultery was proved, and in my opinion it thereupon became their duty under s. 7 to discharge the order. What they did was to make an indorsement upon the order in the terms set out in the case. I do not know what was intended to be the effect of that indorsement. It may be that the reason of it was that the justices desired to make it clear that the wife's remedy was to be kept alive as to arrears of payments which had accrued due before that date. But however that may be, I am of opinion that after the adultery had been proved on December 4, 1901, the order ought to have been discharged, and from that date it ceased to be an effective order. The appellant was subsequently committed to prison for non-payment in respect of the period before the date of the adultery, and then the present proceedings in which a sum of 18*l*. was claimed were instituted, and a committal order was made. The appellant offered to pay so much of that sum as represented the arrears up to December 4, 1901, the date of the adjudication as to the wife's adultery, and in my opinion he was not liable to pay anything after that date. The magistrate had therefore no power to send him to prison for non-payment of the 18*l*., and the appeal must be allowed.

WILLS J. I am of the same opinion. With regard to the preliminary objection the matter stands thus. Orders for payment made under the Act of 1895 are by s. 9 to be enforced in the same way as affiliation orders; and on looking at s. 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895, and is not one to which s. 11 of that Act applies. It stands on the same footing as an order of committal made in an ordinary affiliation case. That order is of course subject to the Summary

1903

RUTHER v. RUTHER.

Wills J.

Jurisdiction Act, 1857, s. 2, and to the Summary Jurisdiction Act, 1879, s. 33, which give justices power to state a case after the determination of any information or complaint. These provisions are by s. 54 of the latter Act made specifically applicable to sums due on affiliation orders or on orders enforceable as affiliation orders. The magistrate therefore had jurisdiction to state this case.

As to the main question, it is clear that there is no power to order committal for non-payment of the weekly sum after adultery on the part of the wife has been proved. I do not mean to say that the respondent was not entitled to recover arrears in respect of the period between the date when the adultery was committed and the date when the order ought to have been discharged; but the sum of 18*l.*, for the recovery of which these proceedings were instituted, covered more than that period, and the magistrate therefore had no power in the circumstances of this case to send the appellant to prison for non-payment of the sum of 18*l.* If the case had come before the Court on application for certiorari, there can be no question but that the warrant of committal would have been quashed.

CHANNELL J. I agree. The only point of substance which has been raised on behalf of the respondent is whether conduct by a husband which has conduced to his wife's adultery has the effect of preventing the husband from obtaining the discharge of an order in the same way as such conduct before an order prevents the husband from relying on the adultery as a reason why an order should not be made. In my opinion it is impossible to adopt Mr. Rowsell's construction of s. 7. The proviso in s. 6 cannot be read into s. 7. That being so, the appellant's liability to continue the payments ceased after the adultery had been proved. The other questions in the case are simply matters of form.

Appeal allowed.

Solicitors for appellant: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

Solicitors for respondent: *H. A. Sims, for Powell & Hughes, Brynmawr.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1903
June 30.

VAN LAUN & CO. *v.* BARING BROTHERS & CO., LIMITED.
LEWISON, CLAIMANT.

Practice — Interpleader — Appeal — Summary Decision of Judge—Leave to Appeal—Order LVII., *rr.* 9, 11 — *Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 5.

Where in interpleader proceedings a judge decides the question as one of law under Order LVII., r. 9, without directing the trial of an issue, or ordering a special case to be stated, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s. 17, and is not subject to appeal, even by leave.

In re Tarn, [1893] 2 Ch. 280, followed.

APPEAL from an order made by Phillimore J. in interpleader proceedings at chambers as after mentioned.

In this case Messrs. Baring Brothers & Co., Limited, had interpleaded with regard to a sum of 2748*l.* payable by them under an order of the Court of Appeal in an action of *Van Laun & Co.* v. *Baring Brothers & Co., Limited*, as to which rival claims were set up. The moneys in question were claimed by one H. W. Chatterton as having been charged by Van Laun & Co. with the payment to him of money due from them to him. One Mosino and one Lewison, the appellant, also respectively set up claims to the said moneys by reason of charges alleged to have been given to them respectively by Van Laun & Co. upon the said moneys for the respective sums of 2000*l.* and 1000*l.* The master directed an issue to determine the title to the said moneys; but on appeal Phillimore J. varied the master's order, and ordered that the claims of Mosino and Lewison should be barred, and that Baring Brothers & Co., Limited, should pay the moneys in question to Chatterton. There was considerable discussion in the Court of Appeal as to the grounds upon which the learned judge made the order, it being at first suggested that he made it under Order LVII., r. 8; but it was ultimately admitted that his view was that the

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

question whether the appellant was or was not entitled to the amount claimed by him out of the moneys in question was one of law depending upon the construction of documents, and that the judge acted in making the order under Order LVII., r. 9. He gave leave to appeal against his order.

The claimant Lewison appealed against the order so far as it affected his claim.

J. A. Hamilton, K.C., and *J. R. Atkin*, for the respondent, Chatterton, took a preliminary objection to the appeal. There is no appeal against the summary decision of a judge in interpleader proceedings, even with leave: see *Waterhouse* v. *Gilbert* (1), which was a decision of the full Court of Appeal, and *In re Tarn.* (2) The ground upon which those decisions proceeded was that s. 17 of the Common Law Procedure Act, 1860, still remained in full force, and was not affected by Order LVII., r. 11. The law on the subject as declared in those cases is not altered by the Judicature Act, 1894, s. 5, which provides that the power to make rules given by the Judicature Acts shall include power to make rules with respect to the matters contained in and regulated by the enactments described in the schedule to the Act, among which is s. 17 of the Common Law Procedure Act, 1860. It cannot have been intended by s. 5 of the Act of 1894 to give power to the Rule Committee to repeal by a rule the provisions of s. 17 of the Common Law Procedure Act, 1860, and, even if it were, no such rule has ever been made. It may be suggested that the object of the section is to give effect retrospectively to rule 11 of Order LVII., so as to enable an appeal to be brought against the summary decision of a judge in interpleader proceedings, where leave to appeal is given. But it is submitted that it is impossible to give that effect to the section. Such a rule only obtains the force of a statute when certain conditions are fulfilled, such as being laid before Parliament for a certain time. A section declaring that the power to make rules shall include something, as to which there was not before such power, cannot have the effect of validating an already existing

(1) (1885) 15 Q. B. D. 569. (2) [1893] 2 Ch. 280.

rule, if, when originally made and laid before Parliament, it was ultra vires.

Montague Lush, *K.C.*, and *Lewis Thomas*, for the appellant. It is submitted that, where leave to appeal is given, there may be an appeal against the summary decision of a judge in interpleader proceedings. (1) The authorities on this subject previously to 1894 are conflicting, and difficult to reconcile; and the question whether there can be an appeal by leave from the summary decision of a judge in interpleader proceedings under Order LVII., r. 11, can hardly be regarded as conclusively determined. Even if it must be taken to have been finally decided that there could be no such appeal prior to the Judicature Act, 1894, that Act has had the effect of giving such an appeal. At the time when *Waterhouse* v. *Gilbert* (2) was decided, the appeal from chambers was to the Divisional Court, and the only point actually decided in that case was that no appeal lay to the Court of Appeal without leave from the judgment of a Divisional Court refusing to entertain an appeal from a summary decision at chambers in interpleader proceedings. The judgment really turned upon s. 20 of the Appellate Jurisdiction Act, 1876, and it contains no decision, at any rate in terms, that there could not be an appeal by leave from the summary decision of the judge. In *Webb* v. *Shaw* (3) the case of *Waterhouse* v. *Gilbert* (2) was treated as only being an authority for the proposition that there could not be an appeal to the Court of Appeal from the Divisional Court in respect of an interpleader matter disposed of summarily. In *Robinson* v. *Tucker* (4) and *Dawson* v. *Fox* (5) are to be found dicta by Lord Esher M.R. which are distinctly to the effect that by leave there might be an appeal against the summary

(1) Counsel for the appellant at first argued on the assumption that the judge had decided the case summarily under Order LVII., r. 8, and contended that he had no jurisdiction under that rule to do so, having regard to the amount involved and the fact that there had been no consent to his doing so. After some discussion, it ultimately became clear that the judge had decided the case as depending merely on questions of law under Order LVII., r. 9, and therefore no point arose under rule 8. The argument therefore on that head is not given.

(2) 15 Q. B. D. 569.

(3) (1886) 16 Q. B. D. 658.

(4) (1884) 14 Q. B. D. 371.

(5) (1885) 14 Q. B. D. 377.

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

decision of a judge in interpleader proceedings. *Bryant* v. *Reading* (1) merely followed *Waterhouse* v. *Gilbert*. (2) In *Lyon* v. *Morris* (3) the question arose under Order LVII., r. 8, and the parties had consented to the decision of the case summarily by the judge. In the case of *In re Tarn* (4) Lindley L.J. seems to have thought the effect of Order LVII., r. 11, as applicable to a summary decision under rule 9 of that order very doubtful. It is very difficult to see how the words "except where otherwise provided by statute" at the beginning of rule 11 can be read as they have been in some of these cases, namely, as qualifying the words "unless by special leave," &c., and negativing the power to give leave to appeal where there is a statutory provision to the contrary. The natural construction is that they qualify the operative words of the rule which they immediately precede, and not the exception at the end of it.

Assuming that the decisions prior to 1894 established that there was no appeal, even with leave, from the summary decision of a judge in interpleader proceedings, it is submitted that the Judicature Act, 1894, s. 5, coupled with the schedule to that Act, has altered the law in that respect. It is impossible to give an intelligible meaning to s. 5, unless it is so construed. There can be no question of making rules of procedure under s. 17 of the Common Law Procedure Act, 1860, as it originally stood, because that is not a section under which there can be any proceedings, inasmuch as it simply provides that in the cases within it the decision shall be final and conclusive. Sect. 17 of the Common Law Procedure Act, 1860, must have been inserted in the schedule to the Act of 1894 with a view of declaring that the power of making rules given by the Judicature Acts authorized the making of such a provision as is contained in Order LVII., r. 11, namely, that there might by leave be an appeal from the summary decision of a judge in interpleader proceedings; and that rule therefore must be treated as modifying to that extent s. 17 of the Common Law Procedure Act, 1860, and not as ultra vires.

J. R. Atkin, for the respondent, in reply.

(1) (1886) 17 Q. B. D. 128.
(2) 15 Q. B. D. 569.
(3) (1887) 19 Q. B. D. 139.
(4) [1893] 2 Ch. 280.

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

COLLINS M.R. This is an appeal from an order made at chambers by Phillimore J., by which he summarily decided the question in dispute in certain interpleader proceedings. The question appeared to the learned judge to be one of law, and he decided it accordingly under rule 9 of Order LVII., without directing the trial of an issue. The point was at first taken by the appellant's counsel that, as the amount in dispute was 1000*l.*, the assumption of jurisdiction by the learned judge to decide the matter summarily was ultra vires, having regard to the tacit rule of practice which has always prevailed, restricting the exercise of the summary jurisdiction under rule 8 of Order LVII., in the absence of consent, to cases where the amount in dispute does not exceed 50*l.* But the question whether this rule of practice can affect the judge's jurisdiction under rule 8, there being no statutory limit as to the amount with which he may deal under that rule, has become immaterial in this case, because it is now admitted that the judge dealt with the case, and had jurisdiction to deal with it, under rule 9. The question, therefore, is whether the order of the learned judge so made with jurisdiction is the subject of an appeal. It cannot be denied that the law on that question is in a somewhat intricate condition; and there have been a number of cases in the Court of Appeal on the subject, which we have had to examine; but in the result it appears to me clear that the question raised in this case is concluded by authority. There was, I think, in the cases to which I refer, a great difficulty about the first step, which involved the interpretation of rule 11 of Order LVII., and the decision that the rule was compatible with the continued existence of s. 17 of the Common Law Procedure Act, 1860, and had not the effect of modifying the provisions of that section. When that step was once taken, all the rest necessarily followed. Rule 11 provides that "except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way under rule 8 of this order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

Collins M.R.

Court or judge, as the case may be, or of the Court of Appeal." In the present case the judge gave leave to appeal; and it is contended that his decision is consequently not final, the concluding words of the rule allowing an appeal where leave is given. I think that primâ facie there is considerable difficulty as regards the construction of the words of the rule, but their construction has, in my opinion, been finally explained by the Court of Appeal, whose decision is binding on us, and more particularly because, in one of the cases on the subject, the decision was that of the full Court of Appeal. The view taken in these cases appears to have been that the words "except where otherwise provided by statute," at the beginning of the rule, were to be read as a condition governing the application of the whole of what follows; and therefore the question is whether the subject-matter of the appeal in the particular case is regulated by statute otherwise than in accordance with the subsequent part of the rule. Sect. 17 of the Common Law Procedure Act, 1860, provides that the decision of a judge on interpleader proceedings in a summary manner shall be final and conclusive against all parties without giving any power to grant leave to appeal. The effect of the cases appears to me clearly to be that the proper construction of rule 11 is as I have said, and that it leaves untouched the provisions of s. 17 of the Common Law Procedure Act, 1860. In this case we have a decision by the judge at chambers in interpleader proceedings, which purported to be a decision in a summary manner, and, although he gave leave to appeal, that cannot affect the finality of his decision, or give any jurisdiction to treat as otherwise than final the decision which s. 17 makes final. The first decision on this subject to which I need refer, and that which was chiefly relied on, though I think that the matter has perhaps been put still more clearly in a later case, was *Waterhouse* v. *Gilbert*. (1) In that case a master had on interpleader proceedings decided summarily in favour of the grantee of a bill of sale as against an execution creditor, but gave leave to appeal. The judge on appeal to him appears to have thought that the decision of the master was

(1) 15 Q. B. D. 569.

final, because he was for that purpose in the same position as a judge would have been, and therefore the leave given did not let in any right to treat the decision as otherwise than final. Whether the judge was right or wrong in that view is really for the present purpose immaterial: he did in fact refuse to entertain the appeal. There was an appeal from his decision to the Divisional Court, which held that the appeal would not lie; and then there was an appeal to the Court of Appeal, which likewise held that the appeal would not lie. It has been strongly contended before us that the only point decided by the Court of Appeal in that case was that there was no appeal from the Divisional Court to the Court of Appeal, and that the decision did not touch the present case, because here the question is whether there is an appeal by leave from the judge to the Court of Appeal. The case of *Waterhouse* v. *Gilbert* (1) was thought of sufficient importance to come before the full Court of Appeal; and it seems to me clear that the Court did not suppose itself to be merely deciding whether, there having been an appeal to the Divisional Court, there was an appeal from that Court to themselves. The whole argument proceeded, as it seems to me, on the footing that the question was whether s. 17 of the Common Law Procedure Act, 1860, which made the decision in a summary manner at chambers final, had been modified by rule 11 of Order LVII. The decision of the Court appears to me clearly to involve that there was no power in anybody to give leave to appeal so as to prevent that being final which s. 17 of the Common Law Procedure Act, 1860, made final. Brett M.R. in delivering the judgment, in which the other five members of the Court concurred, said: "I was desirous that all the ordinary members of this Court should be present to determine the question of jurisdiction, it being of importance. I will now pronounce our unanimous decision. We are all of opinion that rule 11 of Order LVII. has not in any way affected the 20th section of the Act of 1876. Reading s. 20 of the Act of 1876, and applying to it s. 17 of the Act of 1860, we are all of opinion that in such a case as the present there is no appeal from the decision of the Divisional Court to this Court, or power

(1) 15 Q. B. D. 569.

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

Collins M.R.

in the Divisional Court, or in this Court, to give leave to appeal to this Court." Though the Court did not in terms decide anything but that there was no appeal to the Court of Appeal from the Divisional Court, the real ground of that decision was that the provisions of s. 17 of the Common Law Procedure Act, 1860, were unaffected by Order LVII., r. 11. That decision was followed by *Bryant* v. *Reading* (1) and *Lyon* v. *Morris* (2), which are to the same effect. The last case on the subject to which I need refer is *In re Tarn* (3), where the matter is dealt with even more clearly than in the previous cases. The headnote of that case is as follows: "Where in interpleader proceedings a judge decides a question under Order LVII., r. 9"—that being the rule under which the judge acted in the present case—"without directing an issue or stating a special case, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s. 17, and is not subject to appeal." The case is therefore an express decision on the very point raised in the present case. The Court which decided that case consisted of Lord Esher M.R. and Lindley L.J., and I will cite the judgment of the latter as putting the matter very clearly. He said: "I am of the same opinion, though I feel some difficulty in the case. I was at first disposed to think that an order made under rule 9 was appealable, since rule 11 provides that an order made in a summary way under rule 8 shall be final, but does not say so as to orders made under rule 9. But rule 11 is preceded by the words 'except where otherwise provided by statute.' Now under the Common Law Procedure Act, 1860, the practice was uniform; there was no appeal from an order made summarily under s. 14 or s. 15, which correspond to rules 8 and 9 of Order LVII. Rule 11 is difficult to work out in practice; but the introductory words make the rule not applicable where it would be inconsistent with any statutory provisions as to the finality of an order. We have then to look out of the rules into the statutes; and when we look at the statutes, we find that an order made summarily by a judge in interpleader proceedings is not appeal-

(1) 17 Q. B. D. 128. (2) 19 Q. B. D. 139.
(3) [1893] 2 Ch. 280.

able." It seems to me that the decisions to which I have referred conclusively establish the proposition that such an order as that here in question is not appealable, notwithstanding the existence in earlier cases of dicta uttered by some of the very judges who pronounced those decisions, which may seem inconsistent with that proposition. I think it must be taken that any such dicta are now overruled.

The last argument put forward on behalf of the appellant was based on the provisions of the Judicature Act, 1894. It was argued that, reading s. 5 of that Act in connection with the schedule, the true construction of the Act is that it was intended to give power to make rules repealing or modifying s. 17 of the Common Law Procedure Act, 1860, and that rule 11 of Order LVII. is to be regarded as an exercise of that power. Sect. 5 provides that "the power to make rules conferred by the Judicature Acts, 1873 to 1891, shall include power to make rules with respect to the matters contained in and regulated by the enactments described in the schedule to this Act." Then in the schedule, among other enactments, is included the 17th section of the Common Law Procedure Act, 1860. It is quite clear that the Act treats that section as unrepealed, for it is referred to by the 5th section and schedule taken together as an existing enactment. It would be a very strong thing, that being so, to construe s. 5 as giving a power to repeal its provisions. I do not think that it can have been intended, by giving a power to make rules in respect of matters regulated by that enactment, to empower the Rule Committee to make a rule to overrule it. It appears to me that the Act reasserts its continued vitality. On these grounds I think that the appeal will not lie, and must therefore be dismissed.

MATHEW L.J. I am of the same opinion. It is, no doubt, difficult to put an altogether satisfactory interpretation on Order LVII., r. 11. The subject has, however, been already dealt with by the Court of Appeal in the cases referred to by the Master of the Rolls; and, that Court having interpreted the rule in the manner which he has stated, we have no power to depart from the decision so arrived at, which is of peculiar

C. A. 1903

VAN LAUN & Co. v. BARING BROTHERS & Co.

Mathew L.J.

authority, having been that of the full Court of Appeal. The effect of that decision is that the words at the beginning of the rule "except where otherwise provided by statute" operate to preserve intact the provisions of s. 17 of the Common Law Procedure Act, 1860.

With regard to the other point, namely, as to the effect of s. 5 of the Act of 1894, the provisions of that section appear to me to be prospective in character, enabling the Rule Committee to make rules in the future, and to throw no light on the interpretation of rules previously made.

COZENS-HARDY L.J. I agree that the preliminary objection to the appeal must prevail. We are asked, as it appears to me, in substance to overrule four decisions of the Court of Appeal, one of which, namely, *Waterhouse* v. *Gilbert* (1), was a decision of the full Court. Whatever might have been argued, apart from those decisions, I think it is impossible to say that the point is now open, unless some fresh right of appeal is given by the Act of 1894. The counsel for the appellant has contended that that Act, the general scope of which was to restrict appeals, has had the effect of making appealable an order of the kind now in question, which was not appealable previously to the passing of the Act. I cannot take that view of its provisions. The result appears to me to be that s. 17 of the Common Law Procedure Act, 1860, is still in force, and the effect of it is that no appeal will lie in this case.

Appeal dismissed.

Solicitors for appellant: *Swepstone & Stone.*
Solicitor for respondent: *H. W. Chatterton.*

(1) 15 Q. B. D. 569.

E. L.

OGDENS, LIMITED *v.* NELSON.
THE SAME *v.* TELFORD.

1903
June 11, 12, 22.

Contract—For fixed Period of Time—Continuance of Circumstances necessary to Performance of Contract—Implied Condition.

By a contract made between the plaintiffs, who were dealers in tobacco, and the defendant it was agreed that, in consideration of the defendant undertaking to become a customer of the plaintiffs and to purchase goods direct from them, and not to sign any agreement with any other firm in the tobacco trade which would prevent him from dealing with the plaintiffs, the plaintiffs would thenceforward for a period of four years distribute as an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively, a certain fixed annual sum, and also the expected profits on certain goods sold by the plaintiffs during that period. Before the four years had expired the plaintiffs sold their business to third persons. In an action for the price of goods sold to him the defendant counter-claimed against the plaintiffs for damages for breach of the contract:—

Held, that it was an implied term of the contract that the plaintiffs would continue to carry on business during the full period of four years, and that they would not during that period do any act disabling themselves from earning profits or preventing the defendant from being a customer of the plaintiffs, and that the defendant was entitled to damages.

TRIAL before Lord Alverstone C.J. without a jury.

The plaintiffs were wholesale tobacco dealers, and the defendant in each action was a retail tobacconist. The defendant in each action respectively entered into an agreement in writing dated March, 1902, whereby it was agreed between him and the plaintiffs that in consideration of the defendant agreeing to become a customer of the plaintiffs and to purchase goods direct from them, and not to sign any agreement with any other firm in the tobacco trade which would prevent him from dealing with the plaintiffs, the plaintiffs would for four years from April 2, 1902, distribute among such of their customers in the United Kingdom as purchased goods direct from them, in proportion to the purchases made by such customers from the plaintiffs, (1.) the entire net profits on the goods sold by the plaintiffs in the United Kingdom during

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

such period of four years; and (2.) a bonus of 200,000*l.* in each of the said four years, the bonus to be distributed quarterly as from April 2, 1902, in four equal shares of 50,000*l.* each. The terms of the said agreement are fully set out in the judgment. In pursuance of the agreement the defendants respectively became customers of the plaintiffs, and refrained from signing any agreement with any firm which would have prevented them from dealing with the plaintiffs. On September 27, 1902, the plaintiffs sold their business to a company called the Imperial Tobacco Company of Great Britain and Ireland. The actions were brought to recover from the defendant Telford the sum of 309*l.* 6*s.*, and from the defendant Nelson the sum of 58*l.* 18*s.* 2*d.*, for goods sold to them respectively by the plaintiffs. The defendant in each case admitted the claim, but counter-claimed for damages for breach of the agreement of March, 1902.

Bankes, K.C., *Montague Lush, K.C.*, and *J. R. Randolph*, for the defendant. It was an implied term of the contract between the parties that the plaintiffs would continue to trade during the period of four years over which the contract was to extend, or at all events that they would not wilfully do any act which would put it out of their power to perform their contract, or would prevent the defendant from being a customer of the plaintiffs, and from thereby satisfying the condition upon which he would become entitled to a share of the promised bonus. That such a provision is by implication to be read into the contract is established by a series of authorities. In *McIntyre* v. *Belcher* (1) the plaintiffs sold to the defendant the goodwill of a surgeon's practice, the consideration being a promise on the part of the purchaser to pay to the plaintiffs one-fourth of the gross receipts of the practice during the next four years, if he should live so long. Before that time expired the defendant discontinued the practice. It was held that, as he had wilfully chosen to prevent himself from earning anything, he had committed a breach of the agreement. Willes J. compared the case to

(1) (1863) 14 C. B. (N.S.) 654.

that of a man granting all the apples growing on a tree and then cutting the tree down. In *Inchbald* v. *Western Neilgherry Coffee Co.* (1) the plaintiff was employed by the defendants as a broker to dispose of the shares of the company upon the terms that he was to have a certain sum down, and a further sum when all the shares had been allotted. Before all the shares had been allotted the directors, thinking it better to do so, caused the company to be wound up. It was held that the plaintiff was entitled to damages. In *Stirling* v. *Maitland* (2) S., the agent of an insurance company, being indebted to the company, and being pressed for payment, it was arranged that the plaintiff should pay the money to the company and that the company should appoint him and S. as joint agents with the same rates of payment and remuneration as before. A deed was executed containing a covenant that in case the company should at any time thereafter displace S. from his appointment as agent, then they should forthwith repay to the plaintiff the money so paid by him. Subsequently the company transferred their business to another company. In an action to recover the amount advanced by the plaintiff, it was held that there was an implied covenant by the company that they would not voluntarily do anything by which it would be impossible for them to keep S. in their employ, and that they were consequently liable. In *Telegraph Despatch and Intelligence Co.* v. *McLean* (3) the defendant sold to the plaintiffs a news agency business, part of the price being payable by instalments contingent on the profits of the business. It was held by the Court of Appeal that, as the purchase-money was to be ascertained by reference to the profits, there was an implied covenant by the plaintiffs that the business should be carried on. In *Rhodes* v. *Forwood* (4) it was agreed between Rhodes, a colliery owner, and Forwood, a broker, that in consideration of the services and payments to be mutually rendered for seven years, or as long as Forwood should continue to carry on business at Liverpool, Forwood should be the sole agent at Liverpool for the sale of Rhodes'

(1) (1864) 17 C. B. (N.S.) 733.
(2) (1864) 5 B. & S. 840.
(3) (1873) L. R. 8 Ch. 658.
(4) (1876) 1 App. Cas. 256.

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

coals. There were stipulations in the agreement that Rhodes should have the entire control over the prices for which and the credits at which the coals were to be sold, and that if Forwood could not sell a certain amount per year, or if Rhodes could not supply a certain amount per year, either party might on notice put an end to the agreement. At the end of four years Rhodes sold his colliery. In an action by Forwood for damages for breach of the agreement it was held that the action was not maintainable. But that decision proceeded upon the ground that the nature of the stipulations excluded the implication of any agreement to find work for Forwood during the seven years. The agreement was only to employ him in the sale of such coals as Rhodes sent to Liverpool. In *Turner* v. *Goldsmith* (1) the defendant, a shirt manufacturer, agreed to employ the plaintiff for a term of five years as a traveller, to be remunerated by commission on goods sold. After two years the defendant's manufactory was burnt down, and he did not resume business or further employ the plaintiff. It was held that the plaintiff was entitled to substantial damages for breach of the contract. Lindley L.J. distinguished *Rhodes* v. *Forwood* (2) from the case before him on the ground that in the latter there was an express contract to employ the plaintiff which was wanting in the former. In *Hamlyn* v. *Wood* (3), where the defendants, a firm of brewers, contracted with the plaintiffs to sell to them for a period of ten years all the grains made by the defendants at certain rates, and after five years the defendants sold their business and in consequence ceased to supply grains to the plaintiffs, the Court of Appeal held that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned. There the Court treated the question of whether such an implication ought to be made as depending on the facts of each particular case. In *Brace* v. *Calder* (4) a firm consisting of four partners agreed to employ the plaintiff as manager of a branch of their business for a term of two

(1) [1891] 1 Q. B. 544.
(2) 1 App. Cas. 256.
(3) [1891] 2 Q. B. 488.
(4) [1895] 2 Q. B. 253.

years at a fixed salary, but before the expiration of the two years two of the partners retired from the business, the two surviving partners being willing to retain the plaintiff in their employment. It was held that as a contract to serve four employers was a wholly different thing from a contract to serve two, the dissolution of partnership amounted to a wrongful dismissal of the plaintiff. Rigby L.J. said that the only principle to be derived from the authorities was that "the contract is to be construed according to its express terms, and that no term is to be implied which is not rendered reasonably necessary to carry out the plain intention of the parties," and in accordance with that principle he thought it impossible to imply a term that in the event of the retirement of any of the employers the defendants' contract might be transferred to the new partnership. The only other case besides the two above-mentioned cases of *Rhodes* v. *Forwood* (1) and *Hamlyn* v. *Wood* (2) which is in the plaintiffs' favour is *Northey* v. *Trevillion* (3), where, the defendant having appointed the plaintiff as his sole agent to buy goods for him on commission for a period of ten years, Phillimore J. refused to imply a term in the contract that the defendant would continue to carry on business for ten years so as to supply the plaintiff with orders. He drew a distinction between the case of a mere contract of agency, where the agent is in an independent position and is remunerated by commission on such work as he chooses to do, and one in which the employee is in a position of service or subordination, and in which if he is paid by commission the commission is in the nature of salary. Apart from those three cases, the authorities cited establish that where the contracting party does an act which puts it out of his power to perform his part of the contract he has committed a breach of the contract.

Asquith, K.C., *Duke, K.C.*, and *F. E. Smith*, for the plaintiffs. There is in the contract between Ogdens and the defendants no express agreement that Ogdens will continue to carry on their business, and there is no ground for inserting into it

(1) 1 App. Cas. 256. (2) [1891] 2 Q. B. 488.
(3) (1902) 7 Com. Cas. 201.

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

by implication a term which it does not contain, and which under the circumstances it would be in the highest degree unreasonable to imply. The rule of law with regard to the implication of stipulations is thus laid down by Bowen L.J. in *The Moorcock* (1): "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." Here it could not have been the presumed intention of the parties that the plaintiffs should be bound to carry on their business at all hazards, and however great the loss involved might be. If the defendants are right, then if the plaintiffs' customers dwindled away till there were only the two defendants left, the plaintiffs would be bound to divide the whole 200,000*l.* between them, and that even though the defendants merely qualified as customers by buying a purely nominal amount of the plaintiffs' goods. Again, suppose that no other tobacconists except the two defendants had signed the contract with the plaintiffs, they would, on the defendants' contention, have had to go on distributing the bonus between them for the whole four years. That obviously cannot have been intended. The proper inference is that the parties contemplated as a condition precedent to the obligation to divide the bonus that the business should be a going concern, and that it should be better worth the plaintiffs' while to carry it on than to give it up and dispose of it to others. Just as in *Rhodes* v. *Forwood* (2) it was held by the House of Lords

(1) (1889) 14 P. D. 64, at p. 68. (2) 1 App. Cas. 256.

that the risk of the colliery owner selling his colliery entire was one of the risks that the agent took upon himself, so here it ought to be held that the defendants took upon themselves the risk of the plaintiffs parting with their business. Cases like that of *McIntyre* v. *Belcher* (1), in which there is a transfer of a business or of property in consideration of a price to be paid out of future profits, stand upon a different footing. The purchaser, having assigned the future profits to the vendor, cannot afterwards derogate from his assignment by destroying that out of which the profits are to accrue. It would be, as Willes J. said, like cutting down the tree after having granted the fruit of it.

Bankes, K.C., in reply.

Cur. adv. vult.

June 22. LORD ALVERSTONE C.J. read the following judgment:—These were two actions brought by Ogdens, Limited, a company in liquidation, to recover certain amounts due for goods supplied to the defendants, Nelson and Telford, respectively. No question arises as to the plaintiffs' claims, which were admitted. The point for decision arises solely upon the counterclaims, which were set up under the following circumstances. Prior to the month of March, 1902, there had been considerable agitation in the retail tobacco trade respecting an alleged attempt to obtain control of the retail tobacco trade in the United Kingdom. This agitation led to the formation of a company called the Imperial Tobacco Company of Great Britain and Ireland, Limited, which had offered to various tobacco dealers, including the defendants, in consideration of their selling the goods of the company and undertaking not to buy any goods of the plaintiffs and certain other companies, a share in a bonus of 50,000*l.* and a share in certain expected profits of the Imperial Tobacco Company. The offers of the Imperial Tobacco Company led to a counter offer by the plaintiff company, which counter offer was accepted by the defendants, and the offer and acceptance constitute the agreement in respect of

(1) 14 C. B. (N.S.) 654.

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Lord Alverstone C.J.

which the counter-claim was made. The offer of the plaintiffs was contained in the following letters:—

Stamp 6*d*. "Liverpool,
"March, 1902.

"*Bonus Distribution.*

"Our entire net profits and two hundred thousand pounds per year for the next four years.

"Commencing April 2, 1902, we will for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us our entire net profits on the goods sold by us in the United Kingdom.

"In addition to the above we will, commencing April 2, 1902, for the next four years distribute to such of our customers in the United Kingdom as purchase direct from us the sum of two hundred thousand pounds per year.

"Distribution of net profits will be made as soon after April 2, 1903, and annually thereafter, as the accounts can be audited, and will be in proportion to the purchases made during the year.

"Distribution as to the two hundred thousand pounds per year will be made every three months, the first distribution to take place as soon after July 2, 1902, as accounts can be audited, and will be in proportion to the purchases during the three months' period.

"To participate in this offer we do not ask you to boycott the goods of any other manufacturer.

"Yours, &c.,
"Ogdens, Limited."

Stamp 6*d*. "22 March, 1902.

"Messrs. Ogdens, Limited,
"Liverpool.

"Dear Sirs,—I beg to inform you that I have not signed the agreement with the Imperial Tobacco Company, Limited, dated March, 1902, and in consideration of participating in your bonus distribution of the entire net profits on goods sold by you in the United Kingdom and two hundred thousand pounds per

year for the next four years as set out in your particulars, I hereby agree not to sign it or any similar agreement with the Imperial Tobacco Company, Limited, or any other company or firm containing any conditions which would prevent me from buying, displaying, selling, or distributing your goods or the goods of any other manufacturer, and I also undertake to continue to buy, display, and sell your goods.

"Yours, &c.,

"(Name) E. Nelson.

"(Witness) "(Address) 100, Queen Street.

"M. Winstone, "(Town) Cardiff."

"100, Queen Street,

"Cardiff."

It was agreed that the contract between the plaintiffs and Telford, which forms the subject of the counter-claim in the other action, was the same.

Pursuant to the bargain so made, the defendants dealt with the plaintiffs respectively, and in the month of July, 1902, they each received a share of the 50,000*l.*, being one quarter of the 200,000*l.* for the three months ending June 30, 1902. On September 27, 1902, the plaintiffs sold their undertaking, including the goodwill of their business in Great Britain, to the Imperial Tobacco Company. The agreement was put in at the trial. The consideration was the sum of 1,500,000*l.* in shares, and certain stock, plant, and buildings at a valuation. The amount due to the defendants as their share of the second 50,000*l.* bonus, in respect of the three months ending September 30, was allowed by the plaintiffs in account, and no question arises respecting that.

It was agreed that no profits had been made by the plaintiffs in the six months ending September 30, 1902, so that no claim was made under that head. The defendants did not ask for any account of profits due to them under the agreement up to the time of sale of the plaintiffs' business to the Imperial Tobacco Company. The defendants' real claim was for damages in respect of the alleged breach by the plaintiffs of the contract contained in the letters hereinbefore set out, by reason of their

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Lord Alverstone C.J.

having transferred their trading undertaking to the Imperial Tobacco Company, thereby preventing themselves from being in a position to earn profits and preventing the defendants from continuing as their customers, and it was further alleged that the plaintiffs, having received consideration to the amount of 1,500,000*l.* for assets including their goodwill, had in fact sold their business to third parties, and were liable for damages for having deprived themselves of the ability to carry out their agreement. It was argued on behalf of the defendants that either the plaintiffs had wilfully prevented themselves from fulfilling their contract, or that it was an implied condition of the contract that the plaintiffs should continue to carry on their business.

The questions of law which arise upon the above facts are, in my opinion, by no means free from difficulty. The case does not appear to me to be governed by any of the authorities which were cited to me. I propose, therefore, to consider in the first instance what are the propositions or principles of law to be deduced from the authorities, and then to endeavour to apply them to the facts of the case.

It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge; further, that, where a person has undertaken to carry on a business, out of the profits of which he has undertaken to pay certain moneys as a consideration for the contract to the other party to the contract, he must not by his own act or default disable and incapacitate himself from further carrying on such business. These propositions are, I think, established by *McIntyre* v. *Belcher* (1), *Inchbald* v. *Western Neilgherry Co.* (2), *Turner* v. *Goldsmith* (3), and *Brace* v. *Calder*. (4) It is further established that, if parties enter into an agreement to which effect can only be given by the continuance of an existing state of

(1) 14 C. B. (N.S.) 664.
(2) 17 C. B. (N.S.) 733.
(3) [1891] 1 Q. B. 544.
(4) [1895] 2 Q. B. 253.

things, there is an implied engagement on the part of each that he will not do anything of his own motion to put an end to that state of circumstances, without the continuance of which effect cannot be given to the arrangement. This is, I think, established by the case of *Stirling* v. *Maitland* (1) and the *Telegraph Despatch and Intelligence Co.* v. *McLean*. (2)

It was contended on behalf of the plaintiffs that in many, if not all, of these decisions the consideration on the one side was wholly performed either by the passing of property or by the payment of money. No doubt this was the fact in some of the cases; but there are certainly others to which that argument does not apply, as, for instance, *Turner* v. *Goldsmith* (3) and *Brace* v. *Calder*. (4) Side by side with these cases, if I may use the expression, there is the other line of authorities upon which the plaintiffs rely, which establish that where the parties have made a contract which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed ought to be implied, unless it is necessary to give to the transaction the effect or efficacy which both parties must have intended it should have: see the language of Bowen L.J. in *The Moorcock* (5), approved of by Lord Esher in *Hamlyn* v. *Wood* (6), and the principles enunciated by the House of Lords in *Rhodes* v. *Forwood*. (7) But the real difficulty is not the enunciation of these principles, but their application. In each case the terms of the contract and its object must be considered in order to ascertain whether the conduct complained of does destroy the object of the contract or prevent the performance of its manifest intention. In this case I have come to the conclusion that the view presented by the defendants is correct. Whichever of the tests, as deduced from the authorities to which I have called attention, be applied, the decision must, I think, be in their favour. There was an undoubted change of position on the part of the defendants. By the acceptance of the plaintiffs' offer they relinquished the

(1) 5 B. & S. 840.
(2) L. R. 8 Ch. 658.
(3) [1891] 1 Q. B. 544.
(4) [1895] 2 Q. B. 253.
(5) 14 P. D. at p. 68.
(6) [1891] 2 Q. B. at p. 492.
(7) 1 App. Cas. 256.

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Lord Alverstone C.J.

prospect of any share in the offer made by the Imperial Company. As regards the 200,000*l.* per annum for a period of four years the offer was definite and distinct, and, to adopt the language of Bowen L.J., the continuance of business by the plaintiffs for a period of four years must have been in the contemplation of both parties in order to give to the transaction the effect which they intended it to have. I therefore think that, applying the test laid down in *Hamlyn* v. *Wood* (1), effect cannot be given to this transaction except upon the theory that the plaintiffs continued to carry on business at least for a period of four years. There is, moreover, in my opinion, another ground upon which the defendants are entitled to rely. Several of the authorities to which I have referred shew that if one party has wilfully put an end to his ability to perform a contract, he has committed a breach in respect of which damages can be awarded. In this case, in September, 1902, the plaintiffs sold the goodwill of their business for a very large price to the Imperial Company. It is common knowledge that in estimating the price that is paid for goodwill the value of the business is taken into consideration, and a certain number of years' purchase, or in some cases a fraction of a year's purchase, of the net profits is estimated, having regard to the nature and character of the business. In this case the effect of the transaction is that the plaintiffs sell their goodwill to the Imperial Company, or, in other words, they realize for a consideration their opportunity and their expectation of earning profits which they otherwise would have made. It is to be observed, moreover, that the sale renders the performance of the contract impossible as far as the distribution of the 200,000*l.* is concerned, because it makes it impossible for the defendants any longer to be customers of the plaintiffs, or, in other words, destroys the possibility of the existence of that state of things without which the contract could not be carried into effect. The act of the plaintiffs prevents the defendants from being able to fulfil the consideration contemplated by the contract. I express the conclusion at which I have arrived with considerable diffidence and hesitation, and there is much

(1) [1891] 2 Q. B. 488.

1903

OGDENS, LIMITED v. NELSON. THE SAME v. TELFORD.

Lord Alverstone C.J.

to be urged in favour of the plaintiffs' contention. I was disposed at one time to think that the reasoning of the judgment in *Rhodes* v. *Forwood* (1) (in which case the circumstances in many respects resemble those in the present case), and particularly the passage in the judgment of Lord Cairns at pp. 265, 266, which was relied upon by Mr. Asquith, apply to this case; but on further examination I think that that case depended entirely upon the view taken by Lord Cairns as to the limited scope of the agreement, as explained at pp. 263, 264 (see also the judgment of Lord Penzance, at p. 272); and I think it well to call attention to the view taken of *Rhodes* v. *Forwood* (1) in later cases, and among others by Lindley L.J. in the Court of Appeal in *Turner* v. *Goldsmith*. (2)

I do not propose at present to deal with the question of damages beyond saying this: it is not, in my opinion, a case for an account; the damages must be general damages estimated as in the case of *Inchbald* v. *Western Neilgherry Co.* (3), taking all things into consideration, and I doubt whether any case has been made for claiming anything in respect of the possible share of profits.

Judgment for the defendants on the counter-claim.

Solicitor for plaintiffs: *G. Thatcher, for Grace, Smith & Hood, Liverpool.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Cousins, Botsford & Phœnix, Cardiff.*

(1) 1 App. Cas. 256. (2) [1891] 1 Q. B. at p. 549.
(3) 17 C. B. (N.S.) 733.

J. F. C.

1903
June 29.

In re BURTON AND BLINKHORN.

Solicitor—Permitting unqualified Person to use Solicitor's Name—Punishment—Discretion of Court—Striking off Roll—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

Sect. 32 of the Solicitors Act, 1843, which enacts that a solicitor "shall and may be" struck off the roll for certain specified offences, does not give the Court a discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll.

In re Kelly, [1895] 1 Q. B. 180, approved and followed.

MOTION calling upon the respondent Burton, a solicitor, to shew cause why he should not be struck off the roll for allowing his name to be used by the respondent Blinkhorn, an unqualified person, contrary to s. 32 of the Solicitors Act, 1843 (1), and calling upon the respondent Blinkhorn to shew cause why a writ of attachment should not be issued against him.

The master, to whom the case had been referred for inquiry, reported that an arrangement had been come to by the respondents under which Blinkhorn had practised as a solicitor under Burton's name and with his consent, Blinkhorn being an unqualified person to Burton's knowledge, for their mutual profit.

Hollams, for the Incorporated Law Society. The Court has no discretion as to the punishment to be inflicted in a case where an offence under s. 32 of the Solicitors Act, 1843, has

(1) By 6 & 7 Vict. c. 73, s. 32, "If any attorney or solicitor shall wilfully or knowingly act as agent in any action or suit in any Court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person . . . . and complaint shall be made thereof in a summary way to any of the superior Courts wherein such attorney or solicitor has been admitted and proof made thereof upon oath to the satisfaction of the Court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case, every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor."

been proved: *In re Kelly.* (1) The Court is, therefore, bound in this case to strike the solicitor off the roll.

J. R. Randolph, for the solicitor. On the true construction of the language of s. 32 the Court is not bound to strike the solicitor off the roll. The minor punishment of suspension may be inflicted. The use of the word "may" in the section shews that the Court has a discretion. In *In re Lamb* (2) Cotton L.J. in discussing s. 32 said: "I assume that, when an application is made to strike a solicitor off the rolls, the Court has power, if it thinks fit, not to inflict so serious a punishment"; and in the same case Lopes L.J. said: "The words 'shall and may be struck off the roll' do confer upon the Court to which the application is made discretionary power as to whether they will strike off the rolls or whether they will adopt some less severe punishment, such, for instance, as suspension." *In re Kelly* (1) is in conflict with these observations, and ought not to be followed. It has not been the invariable practice of the Court in cases under s. 32 to strike the solicitor off the roll. In *Re Grayston* (3) and in *Re A Solicitor* (4), both of which were cases of an offence under s. 32, the punishment inflicted was not striking off the roll, but suspension.

The respondent Blinkhorn did not appear.

LORD ALVERSTONE C.J. The Court is of opinion that this solicitor must be struck off the roll. It has been contended on his behalf that the Court has, under s. 32 of the Solicitors Act, 1843, a discretionary power as to the punishment to be inflicted in a case of this description. I am of opinion that that is not so. I think that the case of *In re Kelly* (1), in which it was held that under s. 32 the Court has no discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll, was rightly decided, and that it is an authority binding upon this Court. It is a decision of a Divisional Court, and is later in date than *In re Lamb* (2), in which Lopes L.J. expressed the opinion which has been cited to us. That case and the others to which we have been referred

(1) [1895] 1 Q. B. 180.
(2) (1889) 23 Q. B. D. 477.
(3) (1888) 32 Sol. J. 680.
(4) (1890) 63 L. T. 350.

1903

BURTON AND BLINKHORN, *In re.*

Lord Alverstone C.J.

were all brought to the notice of the Court in *In re Kelly*. (1) With reference to the cases of *Re Grayston* (2) and *Re A Solicitor* (3), in which the Court did not strike the solicitor off the roll, but merely suspended him from practice, I have some doubt whether the Court, in so doing, purported to act under s. 32, although that section was no doubt referred to. I think that the Court in dealing with those cases may have been exercising the general jurisdiction which it has in cases where a solicitor is called upon to answer matters contained in an affidavit; but in cases under s. 32 the Court has, in my opinion, no discretion as to the punishment to be inflicted.

I only wish to add that, upon the facts proved, this case is clearly one in which the solicitor ought to be struck off the roll.

WILLS J. If it were not for the fact that a discretion has been exercised in two of the cases cited to us, and that two members of the Court of Appeal expressed an opinion in *In re Lamb* (4) that the language of s. 32 does possibly give a discretion, I should not have thought that there could be any doubt as to the meaning of such an expression as "shall and may." I observe that, although the members of the Court of Appeal said that the effect of those words is that there is, or may be, a discretion, no one has given any reason for it, or has explained why the word "shall" ceases to be obligatory, merely because it is followed by "and may." In my opinion the language of s. 32 is quite free from doubt.

CHANNELL J. I agree. Denman J. discussed this point in *Re A Solicitor* (3), one of the cases which was cited in argument. In that case the judges constituting the Court did exercise a discretion, in this sense, that they inflicted a minor punishment than striking off the roll; but, as I read Denman J.'s judgment, I do not think they did so under s. 32. What Denman J. said was: "There are dicta of very learned judges in the Court of Appeal that, even if a case be brought

(1) [1895] 1 Q. B. 180.
(2) 32 Sol. J. 680.
(3) 63 L. T. 350.
(4) 23 Q. B. D. 477.

within the very provisions of s. 32, nevertheless the Court may deal with the case merely under its general authority over solicitors and administer minor punishment, if, in the judgment of the Court, the case be one in which it is not necessary in the interests of the public to act under s. 32." That seems to me to mean that there may be cases in which the Court does not think fit to act under that section, but nevertheless it may administer under its general jurisdiction some other punishment. That may possibly be correct; but in this case there is no other professional misconduct except that which comes within s. 32. In my opinion, if the Court acts under that section, it must strike the solicitor off the roll. I see that I was counsel in that particular case, and I have some recollection that that was the argument which I addressed to the Court, namely, that they were not obliged to deal with the case under s. 32 if there was any other course open to them.

Order to strike the solicitor off the roll and for a writ of attachment to issue against the unqualified person.

Solicitor for the Incorporated Law Society: *E. W. Williamson.*

Solicitors for the respondent Burton: *Sims & Syms.*

F. O. R.

C. A.

1903

May 22.

[IN THE COURT OF APPEAL.]

SERJEANT *v.* NASH, FIELD & CO., AND ANOTHER.

Landlord and Tenant—Lease—Breach of Covenant—Forfeiture—Writ claiming Possession—Service of Writ—Election to determine Tenancy—Statement of Ground of Forfeiture—Determination of Tenancy—Effect on Rights of Third Parties—Subsequent Payment of Rent by Occupier to Lessee—Estoppel.

The lessee of premises created a yearly tenancy under which the plaintiff became tenant and occupier of the premises. On the same day the lessee mortgaged the premises by way of sub-demise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, and a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated bankrupt, failing to pay the interest, the mortgagees appointed a receiver, to whom the plaintiff paid a quarter's rent due at the following Midsummer. Before the next quarterly rent became due the lessor issued a writ to recover possession of the premises; but the writ, which was served on the plaintiff (as occupier) and others, did not contain a statement of the ground of forfeiture. The plaintiff after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, and the receiver, under the powers given by the Conveyancing Act, 1881, distrained. In an action by the plaintiff against the receiver for a wrongful distress:—

Held, that the sub-demise to the mortgagees, without the consent of the lessor, constituted a breach of the covenant as to assignment:

Held, also, that the issue and service of the writ to recover possession of the premises operated as a final election by the lessor to determine the term; that to have that effect it was not necessary that the actual ground of forfeiture should be stated; that with the determination of the term the right of the mortgagees to recover rent from the plaintiff came to an end; and that the distress was in consequence illegal:

Held, also, that the payment of rent to the receiver by the plaintiff, after the service upon him of the writ to recover possession of the premises, did not estop him from shewing, on a claim for subsequent rent, that the title of the mortgagees had determined, inasmuch as the mortgagees were not misled by the payment; and

Per Stirling L.J., on the further ground that payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, unless at the time of payment the lessee knows the

precise nature of the adverse claim, or the manner in which the lessor's title has expired.

Approving *Fenner* v. *Duplock*, (1824) 2 Bing. 10; 27 R. R. 537.

Grimwood v. *Moss*, (1872) L. R. 7 C. P. 360, approved.

APPLICATION for a new trial or that judgment should be entered for the defendants in an action tried before Darling J. and a jury.

The action was brought to recover damages for wrongful distress. The circumstances, so far as they relate to the points upon which the case is reported, were as follows. On May 18, 1896, Mrs. Campbell demised certain premises to the plaintiff for a term of thirty-five years at a yearly rental. One of the covenants in the lease was that the plaintiff would not "assign, underlet, or part with the possession of the said messuage and premises, or any part thereof, without the consent in writing of the lessor first had and obtained, but such consent shall not be unreasonably withheld if the proposed assignee or undertenant shall be a respectable and responsible person." The lease contained a proviso that if the rent should be in arrear, or "if and whenever there shall be any breach of any of the covenants hereinbefore contained, and on the part of the tenant to be observed and performed, then and in any of these cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess, and enjoy as in her first and former estate." In October, 1897, the plaintiff, with the consent in writing of the lessor, assigned the lease to Richard Baker. At the same time the plaintiff became a yearly tenant of Baker of the premises, and Baker, without obtaining the consent of the lessor, mortgaged the premises to Mrs. Lewis by way of sub-demise. Mrs. Lewis died, and, as the mortgage interest was not paid, her executors, as mortgagees of the premises, appointed one Harrison receiver under the Conveyancing Act, 1881. Notice was served on the plaintiff in April, 1901, of the appointment of the receiver, to whom he was required to pay the rent payable by him as yearly tenant under his agreement with Baker. The Midsummer 1901 rent was accordingly paid by the plaintiff to the receiver. Baker

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

had been adjudicated bankrupt early in 1901, and in October of the same year his trustee in bankruptcy disclaimed the lease. Mrs. Campbell was not aware that Baker had mortgaged the premises until she received notice from Harrison that he had been appointed receiver. On September 18, 1901, she issued a writ to recover possession of the premises, the defendants being Serjeant as occupier, Baker, and his trustee in bankruptcy. The two last named did not appear, and judgment was signed against them on September 27. The mortgagees obtained leave on September 25 to defend. No ground of forfeiture was stated in the writ. It would seem that Serjeant was particularly anxious not to move out of the premises at that time or for some months after, and he appeared and defended the action. On October 15 he paid to the receiver the rent that fell due at Michaelmas. Subsequently a statement of claim was delivered which gave the sub-demise by Baker to the mortgagees, without the consent in writing of the lessor, as the ground of forfeiture, and a claim for mesne profits was made. While the action was pending the receiver demanded payment of the Christmas rent from Serjeant. A correspondence ensued between Serjeant's solicitors and the solicitors of the mortgagees, and it was pointed out on behalf of Serjeant that neither the mortgagees nor the receiver had a right to the rent, and that if a distress was put in they would be held liable for damages. On January 11, 1902, the receiver, purporting to act under the power given to a receiver by s. 24 of the Conveyancing Act, 1881, distrained, and the distress was paid out with costs by Serjeant. He then commenced this action against the firm of Nash, Field & Co. (who were solicitors to the mortgagees, a member of the firm being also one of the mortgagees) and Harrison, the receiver. Subsequently to the commencement of this action that which had been brought by Mrs. Campbell to recover possession of the premises was concluded by judgment being entered for her by consent. At the hearing of the present action the learned judge directed the jury that the distress was illegal on the ground that the title of the mortgagees had determined upon the issue and service of the writ in Mrs. Campbell's action to recover posses-

sion of the premises. The jury returned a verdict for the plaintiff, and judgment was entered accordingly.

The defendants appealed.

The ground on which the liability of the defendants, Messrs. Nash, Field & Co., was based was that they had co-operated with Harrison to put in a wrongful distress, and in the Court of Appeal it was held that there was evidence to go to the jury to that effect. A question arose upon the disclaimer by Baker's trustee, but it become unnecessary to decide it. The facts on which the Court decided that no estoppel was raised by the payment by Serjeant of the Michaelmas rent appear in the judgments.

May 21. *Germaine K.C.*, and *G. A. Scott*, for Nash, Field & Co. The covenant in the head-lease as to assigning, underletting, or parting with possession by its terms relates to a change of occupation following on the act of the lessee, and not to a sub-demise not accompanied by a change of occupier. The clause in the lease as to re-entry did not create a forfeiture upon breach of covenant, but only gave a right to elect to avoid the lease. The tenancy between the plaintiff and the mortgagees was valid up to the issue of the writ by the lessor to recover possession, and it is for the plaintiff to shew that something happened to put an end to the tenancy between September 18 and the claim in respect of the Christmas rent. *Jones* v. *Carter* (1) and *Grimwood* v. *Moss* (2) shew that as against the lessor the service of a writ to recover possession is a final election to determine the term; but they do not go so far as to say that all rights of third parties are swept away. The claim by the mortgagees against the plaintiff was for rent, and the only answer that he can make is either eviction or attornment to title paramount. The issue of the writ against him was not an eviction, and there was no attornment because he was defending the action up to a time after the Christmas rent became due, and was in possession all the time. The plaintiff, therefore, failed to shew that the admitted right of

(1) (1846) 15 M. & W. 718. (2) L. R. 7 C. P. 360.

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

the receiver before September 18 to recover and distrain for rent had been displaced: *Woolston* v. *Ross*. (1) His position otherwise would be anomalous, for in the action by Mrs. Campbell he would be saying that he was holding under rights derived from Baker, while in this action he has to set up that Baker and his mortgagees had no interest in the premises. He ought not to be allowed to set up contradictory cases: *Roe* v. *Mutual Loan Fund*. (2)

Further, the plaintiff is estopped from denying the title of the mortgagees. He paid the Michaelmas rent after the issue of the writ by Mrs. Campbell, and therefore with knowledge that the title of the mortgagees was disputed. He cannot be heard to say that the mortgagees had no title, at all events not until the matter has been concluded by judgment in the action by the lessor.

[They referred to *Poole Corporation* v. *Witt* (3); *Ex parte Hart Dyke* (4); *Franklin* v. *Carter* (5); *Mountnoy* v. *Collier*. (6)]

C. S. Medd, for the defendant Harrison. Sect. 4 of the Conveyancing Act, 1892, is inconsistent with the idea that the issue of the writ to recover possession determined the head-lease. [He referred to *Cohen* v. *Tannar*. (7)]

C. A. Russell, K.C., and *H. O. Edwards*, for the plaintiff. The date of the service of the writ is that from which the election to forfeit the lease operated. The subsequent judgment in the action was merely confirmatory. The cases already cited shew that the position is the same as if eviction by force had taken place instead of service of the writ. If so, not merely did the lease come to an end, but also the mortgage which depended on it. There was no estoppel, for the mortgagees were not misled by the payment of the Michaelmas rent. That payment at the most amounted to an admission which could be explained.

Germaine, K.C., in reply.

Cur. adv. vult.

(1) [1900] 1 Ch. 788.
(2) (1887) 19 Q. B. D. 347.
(3) (1846) 15 M. & W. 517.
(4) (1882) 22 Ch. D. 410.
(5) (1845) 1 C. B. 750.
(6) (1853) 1 E. & B. 630.
(7) [1900] 2 Q. B. 609.

May 22. COLLINS M.R. This is an appeal by the defendants from a judgment in favour of the plaintiff in a case tried before Darling J. with a jury. The action was brought for a wrongful distress against defendants who have not severed in their defence. A great many facts have been gone into, but the point that we have to decide turns on only a few of them, and I do not propose to travel into the circumstances of the case more than is necessary. It appears that Mrs. Campbell granted to the plaintiff a lease of a house for thirty-five years, and one of the covenants of the lessee was that he would not assign, underlet, or part with possession of the premises without the permission of the lessor, and there was a clause for re-entry for any breach of covenant by the lessee. The plaintiff assigned the lease with the consent of the lessor to one Baker, and became tenant to Baker of the premises. Baker mortgaged the premises by way of sub-demise to Mrs. Lewis without obtaining the permission of the lessor. For some time he paid the interest on the mortgage, but later on he ceased to do so, and steps were taken by the mortgagees, who were the executors of Mrs. Lewis, to have a receiver appointed. When appointed he would be, by the terms of s. 24 of the Conveyancing Act, 1881, agent for the mortgagor. Baker became bankrupt, and his trustee disclaimed any interest in the lease. No notice of the sub-demise was given to Mrs. Campbell, the lessor, until the receiver gave notice of his appointment. The plaintiff as tenant of Baker paid rent to him, and afterwards to the receiver. On hearing of the sub-demise Mrs. Campbell issued a writ on September 18, 1901, to recover possession of the premises. The present plaintiff was one of the defendants in that action, and was served with the writ. If the covenant in the lease with regard to assignment had not been performed, the lessor had a right to forfeit the lease, and to recover possession of the premises. The writ gave no particulars of the breach complained of. Serjeant, the plaintiff in the present action, was anxious to remain in possession, and, as it seems to me, an arrangement between him and the receiver was made whereby he paid the Michaelmas rent to the receiver. He defended the action to gain time, and

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

Collins M.R.

it was well understood that the payment of rent was de bene esse, because he did not want to leave the premises till a later date. The critical time was when the next payment of rent became due, and on January 6, 1902, Harrison, the receiver, wrote to the plaintiff with regard to that rent. There was some discussion between the parties, and Harrison wrote again that his instructions were to distrain for the rent forthwith. There was a letter in reply from the solicitor of the plaintiff, written to the solicitors to the mortgagees, in which he says that he has advised his client that there was no legal right to distrain. I would add that meanwhile a statement of claim in the action by the head landlord had been delivered resting the right to claim a forfeiture upon the fact that there had been a sub-demise without licence. The rent was not paid, a distress was put in, and damages are now claimed by the plaintiff as for an illegal distress.

It is said on behalf of the defendants that the distress was lawful because there was a subsisting tenancy between the plaintiff and the mortgagees, on whose behalf the distress was put in, and it is contended that the fact that proceedings had been instituted by the head landlord to recover possession of the premises did not in itself determine the tenancy of the plaintiff, and could not alter the rights of third parties. On the other hand, it was contended, and the learned judge so directed the jury, that the tenancy had determined. I am of opinion that this view is correct. There is a final determination of a tenancy under a lease when the lessor, by some final and positive act which cannot be retracted, treats a breach of covenant by the lessee as constituting a forfeiture. There was a faint suggestion that a mortgage by way of sub-demise does not come within the covenant as to assignment, but it cannot be seriously contended that there had been no breach of the covenant in the head-lease, and therefore the condition letting in the right to a forfeiture had happened, and the only question is whether the lessor had availed herself of the breach of covenant in a final manner. I think that she had done so, for, except by taking physical possession of the premises, she had done the only thing

that she could do to indicate her intention to put an end to the lease. The point was decided by authority in the year 1872 in the case of *Grimwood* v. *Moss* (1), in an important judgment by the late Willes J. The learned judge pointed out that the action was one to try the right of possession only, and that under the Common Law Procedure Act it was considered that, having regard to difficulties as to title that might arise, it was better not to provide for any statement of title which, by reason of its specific character, might endanger the right of a person entitled to recover; that the defendant could apply for particulars, but until he did so the action was at large, and was considered as brought in respect of the landlord's right to re-enter for any previous breach of covenant which could be proved. Under the modern practice, up to the issue of the statement of claim the position of the parties is the same as that indicated by the learned judge. The learned judge added, with reference to the case of *Jones* v. *Carter* (2): "I entirely agree that the true principle upon which that decision was founded was, that the bringing of the action of ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter. . . . . It is quite clear if the landlord, instead of bringing ejectment, had entered, he could have justified in an action of trespass by reference to any act of forfeiture which he could prove." That principle is as much applicable to the procedure of to-day as to that under the Common Law Procedure Act which dispensed with the old allegation of entry and ouster. That being so, it is clear that the writ in the action to recover possession was a conclusive election to treat the act of the lessee in sub-demising the premises without the consent of the lessor as creating a forfeiture. It is true that the rights of the parties were not determined by the issue of the writ, and could not be finally determined until the result of the action was known; but that consideration does not affect the fact of the election of the lessor to treat the lease as at an end, subject to proof that there had been a breach of covenant

(1) L. R. 7 C. P. 360. (2) 15 M. & W. 718.

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

Collins M.R.

which entitled her to do so. There was, therefore, no relation of landlord and tenant existing between the mortgagees and the plaintiff, and no right to distrain, and that ground of defence fails.

Then it is said that inasmuch as the plaintiff, after the writ in the action to recover possession of the premises, paid the Michaelmas rent to Harrison, he was estopped when the Christmas rent fell due from denying that the relation of landlord and tenant existed between them. This defence breaks down on two grounds. In the first place, it is very doubtful whether under the circumstances in which the Michaelmas rent was paid to Harrison any estoppel whatever was created, and, in the second place, in order to succeed the defendant must shew that an estoppel existed when the proceedings in the distress were taken. It is clear law that though a tenant cannot deny the title of his landlord to deal with the premises, he may prove that the title has determined. That fact was abundantly proved, and there was certainly no estoppel arising from any act of the tenant which could induce the mortgagees to suppose that they were acting on an admission that the relation of landlord and tenant existed when the distress was put in. This defence also fails, and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The first question is whether Mrs. Campbell had a right to put an end to the lease of May 18, 1896. That turns on the construction of the covenant against assigning, underletting, or parting with the possession of the premises, or any part thereof, without the consent in writing of the lessor first had and obtained. It seems to me that a mortgage by way of sub-demise is within the letter and the spirit of that covenant. If it were not, neither would a mortgage by way of assignment be within the covenant. It is said that a breach of the covenant would only arise if the lessee parted with the possession of the premises; but with that suggestion I cannot agree, for it seems to me that the breach might equally arise whether the mortgage was by way of sub-demise or of assignment. The object of the

covenant is to secure, in the case of an underlessee or assignee, that he should be, according to the description in the covenant, a respectable and responsible person. If the sub-demise in the present case were held not to be a breach of the covenant, it would be possible for the mortgagee to obtain foreclosure, by which practically the whole interest of the lessee would be vested in him, and it might be found that the property had thus passed into the hands of a person who did not come within the description in the covenant. The lessor, therefore, had acquired the right to re-enter, and brought an action to recover possession. No grounds were assigned on the face of the writ for the relief sought. The question then is whether the issue of the writ and service of it on the tenant in occupation of the premises is a determination of the lease. The weight of authority is in favour of that view. The decision in *Grimwood* v. *Moss* (1) is an express authority on the point, and I can find no authority to the contrary. I think that the observations made in *Toleman* v. *Portbury* (2) point in the same direction, though the judgments cannot be cited as expressly affirming the decision of the Common Pleas in *Grimwood* v. *Moss*. (1) The authority of that case has not in any way been impeached by this Court in *Ex parte Hart Dyke* (3), in which case it was not necessary to express an opinion on the point. Our attention has been called to s. 4 of the Conveyancing Act, 1892, as indicating that the mere commencement of an action does not put an end to the provisions of an underlease. That section, however, simply provides that a person claiming as underlessee may come forward and ask the Court to make an order vesting the property in him. The estate or interest vested under such an order would seem to be a new estate or interest, for the Court may impose conditions as to the execution of any deed or document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, shewing that there is not an affirmance of the former estate or interest of the applicant, but a new estate or interest subject to new conditions. Further, the section speaks not of an "underlessee," but of a

(1) L. R. 7 C. P. 360. (2) (1871) L. R. 6 Q. B. 245; (1872) L. R. 7 Q. B. 344.
(3) 22 Ch. D. 410.

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

Stirling L.J.

"person claiming as underlessee," although subsequently the expression "entitled as underlessee" is used. I do not think that the Legislature by the use of that language meant to decide any question with regard to the time at which the lessor must be taken to have determined to avail himself of a forfeiture. I come, therefore, to the conclusion that the lease was forfeited and gone from the time when the writ was served, and that consequently there was no right of distress against the plaintiff.

It is said, however, that the tenancy was recognised by the plaintiff after the issue of the writ by the superior landlord, and that he is precluded from disputing that he was tenant to the mortgagees, because the proceedings to recover possession had not reached a stage at which it could be said definitely that the tenancy had terminated. That, however, is not in my opinion a correct view of the law. Though a tenant is precluded from denying his landlord's title at the time of the demise, yet it is open to him to shew that his landlord's interest has determined. The cases on this point are collected in the notes to *Walton* v. *Waterhouse* in 2 Williams Saunders, 1871 ed. p. 826. In *Doe* v. *Barton* (1), which was a case of a tenant holding under a mortgagor, the law is thus stated by Lord Denman C.J.: "That rule is fully established: viz., that a tenant cannot deny that the person by whom he is let into possession had title at that time; but he may shew that such title is determined." In this case the plaintiff was not let into possession by the mortgagees, but by Baker, the mortgagor. It is true that he paid rent to the mortgagees, both at Midsummer and after the date of the writ at Michaelmas; but this latter payment was made before the delivery of the statement of claim, which for the first time gave information as to the cause of forfeiture relied on. The plaintiff, therefore, when the writ was served on him, was not informed of the ground on which forfeiture was claimed. In these circumstances the payment of rent did not prevent the plaintiff from proving, on a subsequent demand for rent, that his landlord's title had then come to an end. Upon this point *Fenner* v.

(1) (1840) 11 A. & E. 307.

Duplock (1) is an express authority. Looking at the law as laid down in the two cases last mentioned, it seems to me that payment of rent by the plaintiff to a person by whom he was not let into possession did not create an estoppel, but was simply in the nature of an admission which might be explained.

For these reasons I agree that the appeal should be dismissed.

MATHEW L.J. I am of the same opinion. The first question raised was as to the construction of the covenant not to assign without the permission of the lessor. It is said that there has been no breach of this covenant, because it was intended to refer only to assignments to persons intended to be let into possession. I cannot agree that such a limitation should be placed on the covenant. The object was to secure that the occupier of the premises should be a respectable and responsible person. A mortgagee may or may not be a person who comes within that description, and though possession does not necessarily follow upon a mortgage, it may follow on very short notice. It is impossible to say that such a case is outside the language of the covenant.

Then it is said that before the Christmas rent fell due there had been no forfeiture by the superior landlord. It is not disputed that there had in fact been a breach of covenant; but it is said that all that was done was to issue and serve a writ, and that to do so does not finally create a forfeiture. It is suggested that in the interval between the writ and the determination of the action the tenant might create a subordinate interest of which the landlord could not get rid. The decision in *Grimwood* v. *Moss* (2), in which, in my opinion, the principle applicable to such a case is rightly stated, disposes of this argument. There seems to be no ground for the suggestion that doubt was thrown on that decision in the case of *Ex parte Hart Dyke*. (3) All that was said on the point was that it was not necessary to go into it, as the case was decided on another ground.

It is further said that there is an estoppel between the parties

(1) 2 Bing. 10; 27 R. R. 537. (2) L. R. 7 C. P. 360.
(3) 22 Ch. D. 410.

C. A. 1903

SERJEANT v. NASH, FIELD & Co.

Mathew L.J.

to this action, based on a supposed representation made by the plaintiff to the mortgagees that he was still their tenant. Upon the facts of the case that is not so. The position was clear to every one. What the plaintiff, with the assistance of the mortgagees, was doing was to resist the action brought to recover possession of the premises, not because there was a defence on the ground that there had been no forfeiture, but simply that he might be enabled to stay on the premises for some time longer, as in fact he did till the following spring. Under these circumstances there was no representation by the plaintiff to the mortgagees that could possibly raise an estoppel. There was abundant evidence that the distress was put in at the request of the solicitors to the mortgagees. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *T. P. Hugill*

Solicitors for defendants: *Nash, Field & Co.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.

1903

May 28; *July* 8.

SMITH *v.* BETTY.

Payment — Appropriation — Statute of Limitations — Option of Creditor to appropriate—Limit on Exercise of Option—Set-off—Solicitor and Client—Solicitor's Bill—Sum received on Account of Client.

The executor of a deceased solicitor brought an action in 1902 to recover costs alleged to be due to his testator's estate from the defendant, of which a bill had been delivered to the defendant, together with a cash account, on December 2, 1899. The items of the bill extended over a period from 1878 to 1899, and, the Statute of Limitations being pleaded, the judge at the trial gave judgment for the defendant in respect of all items prior to 1893, as being statute-barred. He referred the rest of the bill to a master for taxation, and to take the cash account from 1893, directing that credit should be given to the defendant for all sums of money received by the plaintiff's testator for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed. Upon taxation the defendant brought in a surcharge in respect of a sum of 66*l.*, which had been received by the plaintiff's testator, as the defendant's solicitor in an action brought by the defendant, in 1894, and not accounted for to the defendant. No cash account had been delivered by the plaintiff's testator to the defendant except the account of December 2, 1899, which, through an inadvertence, contained no entry of the said sum of 66*l.* The plaintiff claimed that this sum should be treated as appropriated to payment or satisfaction of items which had accrued due from the defendant to the plaintiff's testator prior to 1893 :—

Held, that the said sum of 66*l.* could not be set off against the statute-barred items under the statutes of set-off; and that, assuming that the plaintiff's testator would have had a right to appropriate the said sum to these items, yet, there having been no such appropriation, it was not, having regard to the terms of the judgment of the learned judge at the trial, open to the plaintiff so to appropriate the said sum subsequently to that judgment: and therefore that the surcharge in respect of the said sum of 66*l.* must be allowed.

APPEAL by the defendant from an order of Wright J. varying the decision of a master on taxation of a bill of costs as after mentioned, and cross-appeal by the plaintiff.

The action was brought on January 25, 1902, by the executor of a deceased solicitor to recover a sum claimed by the plaintiff to be due to his testator's estate in respect of costs, a bill

C. A. 1903

SMITH v. BETTY.

of which had, together with a cash account, been delivered to the defendant on December 2, 1899. The items of the bill extended over a period from May 13, 1878, to February 6, 1899, there being however no items from June 3, 1889, to November 24, 1893. By the defence, the Statute of Limitations was pleaded and money was paid into court.

The action came on for trial before Wright J., who held that, the continuity of the account being broken by the interval between 1889 and 1903, the items prior to 1893 were statute-barred, and ordered that "the bill of costs on which this action is brought be referred to the taxing master for taxation, and to take the cash account from 1893, and that the plaintiff should give credit for all sums of money received by him (1) for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed, and that the plaintiff be at liberty to sign judgment for the amount of the master's certificate in the said taxation."

Upon the taxation the defendant brought in a surcharge in respect of a sum of 66*l.* 3*s.* 8*d.*, received in 1894 by the plaintiff's testator, as the defendant's solicitor, from the solicitors for a firm of Rigby & Co. in an action brought by the defendant against Rigby & Co. The question raised by the appeals was whether the plaintiff was entitled to treat this sum of 66*l.* 3*s.* 8*d.* as appropriated in payment or satisfaction of items in the bill of costs, amounting to 36*l.* 12*s.* 8*d.* in respect of cash disbursements and 25*l.* 11*s.* in respect of costs, which had accrued due from the defendant to the plaintiff's testator prior to 1893. The facts with regard to this question are sufficiently stated in the judgment of Stirling L.J. The taxing master allowed both the 36*l.* 12*s.* 8*d.* and the 25*l.* 11*s.* by way of set-off against the surcharge. On appeal Wright J. affirmed the master's decision as to the 36*l.* 12*s.* 8*d.*, but reversed it as to the 25*l.* 11*s.*

G. A. Scott, for the defendant. The defendant is entitled to be credited by way of surcharge with the whole of the sum of 66*l.* 3*s.* 8*d.* received by the solicitor on the defendant's account

(1) *Semble*, this should be "his testator."

in the action against Rigby & Co.; and none of that sum can be set off against or appropriated to the statute-barred items prior to 1893. The plaintiff's testator would have had no right to make such an appropriation. It was held in *Waller* v. *Lacy* (1) that a solicitor could not, without the consent of the client, appropriate in payment of debts due to him from the client, which were statute-barred, a sum received by him on account of the client for damages recovered in an action.

Assuming that the solicitor could have so appropriated this sum, there is really no evidence that he ever did so. It is not suggested that this sum was omitted from the cash account of December 2, 1899, otherwise than by inadvertence; but the fact remains that it is not entered in any account ever made out by the solicitor as between himself and the defendant. There is nothing to shew that he ever credited the defendant with it in any account.

Le Riche, for the plaintiff. In *Waller* v. *Lacy* (1) the client apparently did not know that the sum had been received by the solicitor. The creditor's option to appropriate a payment only arises if the debtor fails to exercise his option to appropriate it; and the debtor's option does not arise till knowledge of the payment. The proper inference in this case from the facts is that the defendant perfectly well knew that this sum had been received by the solicitor, and was willing that it should be set off against what might be due to him. Therefore the principle on which the decision in *Waller* v. *Lacy* (1) rested is inapplicable to the present case. The solicitor had a right to appropriate this money to items then due to him; and it is submitted that the inference is that he did so appropriate it.

It is further submitted that there was really no need of any specific appropriation, but the items of account as between the solicitor and the defendant must be treated as set off or appropriated against each other in order of date, according to the rule in *Clayton's Case*. (2)

The solicitor was entitled to a lien on this sum for the costs due to him, which is not affected by the Statute of Limitations,

(1) (1840) 1 Man. & G. 54; 56 R. R. 291.

(2) (1816) 1 Mer. 572, 585; 15 R. R. 161.

C. A. 1903

SMITH v. BETTY.

for that statute only bars the remedy for a debt by action, but does not destroy the debt or any other remedy for it: *Higgins* v. *Scott.* (1)

Assuming that there was no appropriation before action, the plaintiff is entitled now to appropriate this sum of 66*l.* 3*s.* 8*d.* to items due to the solicitor prior to 1893. The right so to appropriate continued until the amount for which final judgment was to be entered in the action was ascertained by the certificate of the taxing master.

G. A. Scott, for the defendant, in reply. There can be no solicitor's lien on the sum in question in respect of items prior to 1893. There is no evidence that the defendant ever knew that this sum had been received by her solicitor, or that he ever in fact appropriated it in payment of what was due to him. There is no account in this case of such a nature as to render applicable the doctrine of *Clayton's Case* (2): see *Cory Brothers & Co.* v. *Owners of the Mecca.* (3) The plaintiff cannot now appropriate the sum in question to items prior to 1893. The time when the right of appropriation ceases is the commencement of the action: *Mills* v. *Fowkes.* (4) At any rate it ceases after a case has been left for the consideration of the jury: see per Taunton J. in *Philpott* v. *Jones.* (5) In this case the order of the learned judge at the trial is equivalent to the verdict of a jury. The terms of his order clearly exclude the consideration of any items prior to 1893.

Cur. adv. vult.

July 8. The judgment of the Court (Collins M.R., Stirling L.J., and Mathew L.J.) was read by

STIRLING L.J. This action was brought on January 25, 1902, by the executor of the late Charles Thomas Foster, a solicitor, to recover a sum of 260*l.* 1*s.* 4*d.*, claimed to be due in respect of a bill of costs for the period from May 13, 1878, to February 6, 1899, which bill, together with a cash account, was

(1) (1831) 2 B. & Ad. 413; 36 R. R. 607.
(2) 1 Mer. 572, 585; 15 R. R. 161.
(3) [1897] A. C. 286.
(4) (1839) 5 Bing. N. C. 455; 50 R. R. 750.
(5) (1834) 2 A. & E. 41; 41 R. R. 371.

delivered to the defendant on December 2, 1899. By the defence the Statute of Limitations (21 Jac. 1, c. 16, s. 3) was pleaded. The action came on for trial on December 19, 1902, before Wright J., who held that the defence of the Statute of Limitations was good as to all items in the bill of costs incurred previously to 1893, and made an order in the following terms: "That the bill of costs on which this action is brought be referred to the taxing master for taxation, and to take the cash account from 1893, and that the plaintiff should give credit for all sums of money received by him for or on account of the defendant in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed, and that the plaintiff be at liberty to sign judgment for the amount of the master's certificate in the said taxation."

Upon the taxation the defendant brought in a surcharge for a sum of 66*l.* 3*s.* 8*d.*, consisting of 65*l.* debt, and 1*l.* 3*s.* 8*d.* interest, received by the deceased solicitor from the solicitors for a firm of Rigby & Co. on May 9, 1894, in an action brought by the defendant against Messrs. Rigby & Co. It was admitted by the plaintiff that this surcharge was valid. It was at the same time admitted by the defendant that, although this sum did not appear in the cash account delivered on December 2, 1899, the omission was not intentional, but was simply due to some inadvertence on the part of the solicitor. The plaintiff claimed that this sum was not one which was received by the solicitor "for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs" under taxation; and that it ought to be treated as applied in payment of what was due to the solicitor from the defendant on May 9, 1894, in respect of statute-barred items. The taxing master took this view, and, finding that at this date there was due to the solicitor 36*l.* 12*s.* 8*d.* on the cash account, and 25*l.* 11*s.* in respect of costs (which he taxed), allowed those sums by way of set-off against the surcharge. From this decision there was an appeal to Wright J., who affirmed the taxing master's decision as to the cash balance of 36*l.* 12*s.* 8*d.*, but reversed it as to the costs amounting to 25*l.* 11*s.* Both parties have appealed from the order of

C. A. 1903

SMITH v. BETTY.

Stirling L.J.

Wright J., the plaintiff seeking to have the taxing master's decision restored, while the defendant insists that it ought to be reversed as to the cash balance as well as the costs.

The earliest entry in the bill of costs with respect to the action brought by the defendant against Rigby & Co. occurs on November 24, 1893. The writ was issued on January 29, 1894, and the action proceeded in regular course, and was duly entered for trial. On April 24, 1894, Messrs. Rigby & Co.'s solicitors informed Mr. Foster that they were instructed not to contest the matter any further, and proposed to issue a summons to stay further proceedings on payment of the amount claimed and costs. On April 25 Mr. Foster by letter informed the defendant of this proposal, and stated that it would be about a fortnight before the costs were taxed and the amount paid. On April 26 the defendant sent a telegram: "Delighted at the good news contained in your letter." It appeared from the bill of costs delivered by Mr. Foster that the debt of Rigby & Co. was paid on May 9, 1894. In a letter written by Mr. Foster to the defendant in 1895 he expressed an intention to send to the defendant an account; but in fact none was sent except that rendered with the bill of costs on December 2, 1899.

Counsel for the plaintiff contended that the decision of the taxing master ought in these circumstances to be supported on the ground either of lien, or set-off, or appropriation of payments. It is quite clear that the Statute of Limitations only bars the remedy by action, and does not destroy the debt or affect any remedy by way of lien, whether on a judgment recovered by the exertions of the solicitor: *Higgins* v. *Scott* (1); or on papers in his hands: *Curwen* v. *Milburn*. (2) The lien of a solicitor on a fund recovered is confined to the costs of the action in which it is recovered: *Bozon* v. *Bolland* (3); the party and party costs of the defendant in the action were paid to Mr. Foster by Rigby & Co.; so that the lien on the debt due from them only extended to the excess of the costs of the action as between solicitor and client over those between party and party, an excess which is stated only to amount to about

(1) 2 B. & Ad. 413; 36 R. R. 607. (2) (1889) 42 Ch. D. 424.
(3) (1839) 4 My. & Cr. 354; 48 R. R. 121.

5*l.*, and is in any event unaffected by the judgment. No question as to a lien on papers arises. I am therefore unable to see that the solicitor had any right of lien which can avail the plaintiff in this action.

Neither in my judgment can the plaintiff claim any statutory right of set-off; for, as was laid down by Wilde C.J. in *Francis* v. *Dodsworth* (1), the judicial construction of the statute of set-off "has been that no debts can be used by way of set-off . . . . except such as are recoverable by action." Here the debt relied on by the plaintiff has in this very action been held not to be so recoverable; and to give effect to a set-off by the plaintiff would be to go behind the judgment.

It was contended on behalf of the plaintiff that the solicitor was entitled to appropriate, and must be taken to have appropriated, the sum in question to the cash balance and costs found to have been due to him on May 9, 1894. To this it was answered on behalf of the defendant, first that in the circumstances no right of appropriation existed; and secondly that, even if it did exist, it had not been, and could not now be, exercised. On the first of these points much reliance was placed on *Waller* v. *Lacy* (2), where it was decided that a solicitor had no right to appropriate to a statute-barred debt a sum received by him on behalf of, but without the knowledge of, the client. In the present case the fair inference from the facts appears to be that the sum of 66*l.* 3*s.* 8*d.* was received and retained by the solicitor with the knowledge of the client, and it may be, and I am willing to assume, that on this ground the authority cited does not apply. Still it is quite clear that, previously to the judgment in this action, no effective appropriation was in fact made. In the only account rendered to the defendant this particular item does not appear; and there is no room for the application of the doctrine of *Clayton's Case* (3): see *The Mecca*. (4) After judgment I do not think that it was any longer open to the plaintiff to make an appropriation; for the authorities, although the language used in them varies, appear to shew that there is some limit on the

(1) (1847) 4 C. B. 202, at p. 220.
(2) 1 Man. & G. 54; 56 R. R. 291.
(3) 1 Mer. 572, 585; 15 R. R. 161.
(4) [1897] A. C. 286.

1903

SMITH v. BETTY.

Stirling L.J.

exercise by a creditor of an option to appropriate; as for example, the communication of the appropriation to the debtor: *Simson* v. *Ingham* (1); or the bringing of an action: *Mills* v. *Fowkes* (2); or, as is said by Taunton J. in *Philpott* v. *Jones* (3), before the case came under the consideration of a jury. In the present case the terms of the judgment seem to me to preclude a subsequent appropriation.

For these reasons I think that the appeal of the defendant ought to succeed, and that the appeal of the plaintiff fails.

Appeal allowed. Cross-appeal dismissed.

Solicitor for plaintiff: *Arthur Price.*

Solicitors for defendant: *Underwood, Son & Piper.*

E. L.

1903

May 4, 12.

THE BOARD OF TRADE *v.* THE SAILING SHIP "GLENPARK," LIMITED.

Shipping—Seamen—Shipwreck—"Distressed Seamen"—Expenses of Maintenance, &c., Abroad—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping* (*Mercantile Marine Fund*) *Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

A seaman who is shipwrecked abroad from a British ship is a "distressed seaman" within the meaning of ss. 191, 193 of the Merchant Shipping Act, 1894, and s. 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, notwithstanding that he has in his possession money of his own which is more than sufficient to maintain him and provide him with a passage home.

In proceedings by the Board of Trade to recover from a shipowner expenses incurred in the maintenance and relief of distressed seamen abroad, the production of the account of those expenses, and proof of payment of that account by or on behalf of the Board of Trade, are, by s. 193, sub-s. 3, of the Merchant Shipping Act, 1894, made conclusive evidence of their right to recover.

COMMERCIAL CAUSE, tried before Bigham J.

Action by the Board of Trade to recover from the defendants,

(1) (1823) 2 B. & C. 65; 26 R. R. 273.

(2) 5 Bing. N. C. 455; 50 R. R. 750.

(3) 2 A. & E. 41; 41 R. R. 371.

as owners of the sailing ship *Glenpark*, 99*l*., being the balance of moneys paid by the plaintiffs in respect of the maintenance and relief of certain seamen alleged to have been "distressed seamen" within the meaning of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). (1)

The following material facts appeared from an admitted statement of facts on which the action was tried:—

The *Glenpark* was a British ship within the meaning of the Merchant Shipping Act, 1894, and the defendants were at all material times the registered owners of her. On February 1, 1901, the *Glenpark*, whilst in the course of a three years' trading voyage, struck on a sunken rock near Wedge Island, in Spencer Gulf, South Australia, and became a total wreck. The crew lost the whole of their effects except the clothes they were wearing, but were saved, and taken in the ship's boats to Port Victoria, in South Australia, arriving there on February 2, 1901.

(1) By s. 190 of the Merchant Shipping Act, 1894, the Board of Trade may make regulations "with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad." By s. 191, certain prescribed "authorities," including Governors of British possessions, shall, in accordance with and on the conditions prescribed by the regulations, provide for the maintenance and sending home of seamen and apprentices (in the Act included in the term "distressed seamen") "who by reason of having been discharged or left behind abroad or shipwrecked from any British ship are in distress in any place abroad." By sub-s. 4, "the authority shall be paid in respect of the expenses of the maintenance and conveyance of distressed seamen such sums as the Board of Trade may allow, and those sums shall, on the production of the bills of disbursements, with the proper vouchers, be paid as hereinafter provided." By s. 193, as amended by s. 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), where any expenses on account of a "distressed seaman" are incurred by or on behalf of the Crown, those expenses shall be a charge upon the ship to which such distressed seaman belonged, and shall be a debt to the Crown from the master of the ship, or from the owner of the ship for the time being. By sub-s. 2 of s. 193, "the debt . . . . may be recovered by the Board of Trade on behalf of the Crown either by ordinary process of law, or in the Court and manner in which wages may be recovered by seamen"; and by sub-s. 3, "in any proceeding for such recovery the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade, shall be sufficient evidence that the expenses were incurred or repaid by or on behalf of the Crown."

1903

BOARD OF TRADE v. SAILING SHIP "GLENPARK," LIMITED.

They were there maintained for two days by the Governor of South Australia, on behalf of the Crown acting by the Marine Board of South Australia (being one of the authorities referred to in s. 191 of the Merchant Shipping Act, 1894), and were then sent from Port Victoria to Port Adelaide, where they arrived on February 4, 1901, and were maintained at Port Adelaide by the same authority. On February 6, 1901, the representatives of the owners of the *Glenpark* paid each member of the crew the balance of wages due to him up to the time the ship was lost. Some of the crew, having failed to obtain employment at Port Adelaide, were provided by the same authority with passages to the United Kingdom. The total amount expended by the authority was 236*l.* 5*s.* 1*d.*, and the plaintiffs paid that sum to the authority as money due to them in respect of expenses incurred on account of distressed seamen within the meaning of s. 193 of the Merchant Shipping Act, 1894, and claimed to recover the whole of that sum from the defendants under that section and s. 4 of the Merchant Shipping, &c., Act, 1898. The plaintiffs furnished an account of the expenses in accordance with the Merchant Shipping Act, 1894, and the distressed seamen regulations, and produced that account at the trial of the action. The defendants, for the purposes of the present case, did not dispute liability as regarded expenses incurred in respect of any member of the crew whose wages up to the time the ship was lost were less than the amount expended by the authority upon his maintenance and conveyance, but disputed liability as to eleven members of the crew, the wages paid to whom were in each case more than the expenses so incurred. The expenses incurred in respect of those eleven members amounted to 99*l.*, the sum claimed in the action.

Sir Robert Finlay, *A.-G.*, and *Sir Edward Carson*, *S.-G.*, (*Henry Sutton* with them), for the plaintiffs, contended that they were entitled to recover the sum claimed on the grounds:—

First, that, having regard to the general scheme and provisions of the Merchant Shipping Act, 1894, as amended by the Merchant Shipping (Mercantile Marine Fund) Act, 1898, those members of the crew of the *Glenpark* who had received at

Port Adelaide wages to a greater amount than the amount of the expenses incurred in respect of their maintenance and passage home were "distressed seamen" within the meaning of s. 193 of the Act of 1894 and s. 4 of the Act of 1898; that the distress contemplated in those sections had reference to the fact of shipwreck abroad, and when that event happened it was immaterial whether or not the shipwrecked seaman had in his possession from any source money or property of his own sufficient to maintain him and provide him with a passage home.

Secondly, that on the true construction of s. 193, sub-s. 3, of the Act of 1894 the production of the account of the expenses furnished in accordance with that Act, and proof of payment of those expenses by or on behalf of the Board of Trade, were conclusive evidence of their right to recover.

Danckwerts, K.C., and *Leslie Scott*, for the defendants, contended that a shipwrecked seaman did not become "distressed" within the meaning of the Acts so long as he had in his possession from whatever source sufficient money of his own to provide for his necessities for the time being; that the statutes referred to pecuniary distress, as was indicated by the nature of the relief provided for by the Legislature and the scheme and provisions of those statutes. On the second point they contended that s. 193, sub-s. 3, of the Merchant Shipping Act, 1894, only meant to make the production of the account, and proof of payment, sufficient evidence of the fact that the expenses had been incurred and paid, and did not preclude the shipowner from disputing that they had been legally incurred and paid, and from disputing his liability to repay them.

[They cited, as to what was meant by the term "sufficient evidence," *Barraclough* v. *Greenhough* (1), *Northard* v. *Pepper* (2), and *Reg.* v. *Fordham.* (3)]

Cur. adv. vult.

May 12. BIGHAM J. read the following judgment:— The first question which I have to determine in this case is

(1) (1867) L. R. 2 Q. B. 612. (2) (1864) 10 L. T. (N.S.) 782.
(3) (1873) L. R. 8 Q. B. 501.

1903

BOARD OF TRADE v. SAILING SHIP "GLENPARK," LIMITED.

Bigham J.

whether those men who received wages in excess of the expenses incurred on their behalf were "distressed seamen" within the meaning of the Merchant Shipping Act, 1894. The defendants say that they were not, upon the ground that the Act was not intended to assist men who are in a position to assist themselves. It is necessary, therefore, to look at the terms of the Act. Part 2 deals with the rights and duties of owners, masters, and crews of seagoing ships registered in the United Kingdom. One sub-division of this part is headed "Distressed Seamen," and it comprises ss. 190 to 193 of the Act inclusive. By s. 190 the Board of Trade is empowered to make regulations for the relief, maintenance, and sending home of seamen found in distress abroad; and the section enacts that no seaman shall have any right to be relieved, maintained, or sent home except in the cases provided by those regulations. In pursuance of the directions in this section, the Board of Trade has made regulations, and by No. 86 it is declared that the persons to be relieved shall include seafaring persons who, having been engaged in merchant ships, are shipwrecked and found in distress in foreign ports. No relief, however, is to be afforded to shipwrecked seamen who refuse to work their passage home, or who refuse to accept reasonable employment (regulation No. 90); nor are shipwrecked seamen who stand by the wreck to salve property to be considered as distressed seamen during the time they are so earning money (regulation No. 95). Thus the regulations mention who are and who are not to receive relief. Then s. 191 of the Act directs how distressed seamen are to be relieved. The duty of affording the relief is cast upon governors, Consular officers, and others who are named in the section, and who are referred to in the Act as "the authorities." This section directs such authority to find a passage home for, and in the meantime to maintain, any seamen who, by reason of having been shipwrecked, are in distress in any place abroad, and enacts that the authority shall be paid, in respect of the expenses incurred, such sums as the Board of Trade may allow. Sect. 193, as amended by s. 4 of the Merchant Shipping Act, 1898, directs that the amount of such expenses shall be a debt to the Crown from the ship-

owner, and shall be recoverable by the Board of Trade on behalf of the Crown by ordinary process of law. These are all the material provisions, and there is nothing in any of them which in terms excludes from the category of distressed seamen those who, being shipwrecked, happen at the date of the disaster to be entitled to arrears of wages. Nor do I find anything from which I can imply such an intention. In a sense, no doubt, a shipwrecked sailor who happens to have money in his pocket, or a valuable ring on his finger, or a right to arrears of wages, is not in so bad a plight as his shipmate who has none of these advantages; but both of them are, in my opinion, "seamen who by reason of having been shipwrecked are in distress" within the meaning of s. 191 and of regulation No. 86. If the Legislature had intended to exclude from the benefits of the Act men who had means of their own at their command, I think it would have said so. In the connection now under consideration the definition of distress is not to be found in the man's slender purse, but in the fact that he has been cast from his ship in a foreign country. I therefore come to the conclusion that all the men mentioned in this case were "distressed seamen" within the meaning of the Act. Another question was raised during the argument, namely, whether the production of the account of the expenses, together with proof of payment thereof by the Board of Trade, was not of itself conclusive against the defendants. Having regard to the view I take on the first point, it is not necessary for me to decide this question; but I think it better to do so, for I may thereby save difficulty in future cases. By sub-s. 3 of s. 193 of the principal Act it is provided that in any proceedings for the recovery of the debt "the production of the account (if any) of the expenses furnished in accordance with this Act or the distressed seamen regulations, and proof of payment of the expenses by or on behalf of the Board of Trade shall be sufficient evidence that the expenses were incurred or repaid under this Act by or on behalf of the Crown." I think "sufficient evidence" here means conclusive evidence, and for these reasons: The authority who makes the payments in the first instance acts in the

1903

BOARD OF TRADE v. SAILING SHIP "GLENPARK," LIMITED.

Bigham J.

interest of the shipowner as well as in that of the seaman. This is shewn by such regulations as the 91st, 96th, and 97th, which direct the authority to confine the relief to what is actually necessary. And by sub-s. 4 of s. 191 the Board of Trade has a right to revise the account, and to disallow in favour of the shipowner such items as it may think fit. The authority abroad and the Board of Trade at home are both to protect the shipowner from any undue burden. With provisions such as these for his protection, I do not think the Legislature meant to allow the shipowner to dispute either the propriety of the demand made upon him or its amount. The production of the account and proof of its payment are therefore, in my opinion, meant by sub-s. 3 of s. 193 to be conclusive of the right of the Board of Trade to recover.

Judgment for plaintiffs.

Solicitor for plaintiffs: *The Solicitor of the Board of Trade.*

Solicitors for defendants: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1903
June 16.

McDOWALL *v.* GREAT WESTERN RAILWAY COMPANY.

Negligence—Liability—Intervening Act of Third Party—Trespassers, Interference by—Effective Cause of Damage.

The defendants' servants shunted some trucks and a brake-van, all coupled together, on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point to prevent vehicles, if set loose, from running down the incline; but, for the convenience of their shunting operations, the defendants' servants did not place the trucks and van beyond the catch-point, but screwed down their brakes, and left them in a position in which they would not have caused any damage if not interfered with. Some boys, trespassing on the siding, uncoupled the van from the trucks and released its brake, so that it ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with vehicles placed upon it.

At the trial of an action by the plaintiff, the jury found that the van was in a safe position as and where left by the defendants, unless interfered with afterwards; that the accident would not have happened if the van had not been interfered with; that the interference was the act of trespassers, who acted negligently; that the danger of interference causing injury was known to and could have been guarded against by the exercise of reasonable care on the part of the defendants; and that the negligence of the defendants in not placing the van beyond the catch-point was the effective cause of the accident. Upon those findings the jury assessed damages, and Kennedy J. gave judgment for the plaintiff: [1902] 1 K. B. 618.

On appeal by the defendants:—

Held, that the evidence did not support the findings of negligence on the part of the defendants; and, therefore (applying the rule in *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240, 243), as negligence on their part was not the effective cause of the accident, they were not rendered liable through the interference of trespassers.

APPEAL from the decision of Kennedy J. (1)

The facts are sufficiently stated in the report of the case below.

The appeal was heard on June 16, 1903.

(1) [1902] 1 K. B. 618.

C. A. 1903

McDOWALL v. GREAT WESTERN RAILWAY.

Francis Williams, K.C., and *Denman Benson*, for the defendants. The learned judge below relied on *Clark* v. *Chambers* (1); but in that case, and in every case there cited in which the defendant has been held liable for an accident caused upon his property by the intervening act of a third party, there has been some wrongful, negligent, or careless act on the part of the defendant: *Daniels* v. *Potter* (2); *Bird* v. *Holbrook*. (3) That is the distinction between the present case and *Clark* v. *Chambers* (1), and other similar cases to be found in the books. In *Clark* v. *Chambers* (1) the defendant did an unlawful act by putting up an obstruction on the highway. So in *Dixon* v. *Bell* (4) the act was clearly one that the defendant was not entitled to do—sending a child for a loaded gun.

There is no case in which a man using his own land in the way he has a right to do is liable for an accident arising from such lawful user. Here it was a lawful act on the part of the defendants to leave this train standing on their own land, as they had a perfect right to do, and they had no reason to anticipate that this would result in doing an injury to anybody. The jury have found in the defendants' favour that, as the van was left, it was in a safe position, and that it only became dangerous upon the intervention of the trespassers. When a railway company is using its property in a way sanctioned by statute and guarding against all lawful risk, it is not bound to apprehend, nor to guard against the possibility of, an unlawful act by a stranger, or against an accident which no one could have foreseen: *Blyth* v. *Birmingham Waterworks Co.* (5); *Parker* v. *City of Cohoes*. (6) *Ilott* v. *Wilkes* (7) does not touch this case, for there it was the trespasser himself who was injured, and he voluntarily exposed himself to a known danger. *Lynch* v. *Nurdin* (8) is really a case in favour of the defendants, for the act done was itself obviously a negligent act—leaving a

(1) (1878) 3 Q. B. D. 327.
(2) (1830) 4 C. & P. 262; 34 R. R. 793.
(3) (1828) 4 Bing. 628; 29 R. R. 657.
(4) (1816) 5 M. & S. 198; 17 R. R. 308.
(5) (1856) 11 Ex. 781.
(6) (1878) 10 Hun. (N.Y.) 531; 74 N. Y. 610.
(7) (1820) 3 B. & Ald. 304; 22 R. R. 400.
(8) (1841) 1 Q. B. 29; 55 R. R. 191.

horse and cart in a street unattended. But in *Mann* v. *Ward* (1) it was doubted whether *Lynch* v. *Nurdin* (2) was good law. *Murphy* v. *Smith* (3) is analogous to this case. On a question of alleged negligence as being the cause of an accident on a man's own land, the rule is that it must appear whether all care was taken by him as should be taken by a prudent man: *Vaughan* v. *Menlove* (4); *Smith* v. *London and South Western Ry. Co.* (5), in which case the ground of the decision was that the defendants did not, in using their land, take the precautions against a possible danger which a prudent man would have foreseen. That is the criterion to be applied in the present case. The trucks and van were properly and sufficiently braked and coupled. It may be said that the defendants did not, as they might have done, leave the trucks and van to the eastward of the catch-point, so that if they got loose they would be diverted from the highway; but it is settled that you are not under any obligation to use a particular contrivance or thing merely because it happens to be upon your property. There was no obligation on the part of the defendants to guard against such an act as caused the accident here. *Engelhart* v. *Farrant* (6), which was referred to by the learned judge, does not support his decision, for there the Court had not to decide, as it had to decide here, whether the defendant was negligent, but only whether his negligence, which was admitted, was the cause of the injury.

Arthur Lewis, and *E. M. Samson*, for the plaintiff. The question is, Was there initial negligence on the part of the defendants? It is submitted that there was, for there was a safe and an unsafe place on which they could place the trucks and van, and they selected the unsafe place.

[Vaughan Williams L.J. I do not agree that there was a safe and an unsafe place. The fact is that both places were unsafe. The accident was caused by boys playing upon the defendants' railway, and they were just as likely to make the

(1) (1892) 8 Times L. R. 699.
(2) 1 Q. B. 29; 55 R. R. 191.
(3) (1886) 13 R. 985.
(4) (1837) 3 Bing. N. C. 468, 474-5; 43 R. R. 711.
(5) (1870) L. R. 6 C. P. 14.
(6) [1897] 1 Q. B. 240.

C. A. 1903

McDOWALL v. GREAT WESTERN RAILWAY.

trucks and van run down the incline in the one place as in the other, though for that purpose they might have had some other acts to do in the one place than they had to do in the other. Both places were unsafe if injury could result from leaving the trucks and van in either the one place or the other.]

The defendants had had actual knowledge for years of the mischievous acts committed by boys on this part of their line, and therefore should have taken precautions, especially as this part of their line is, as appears from the evidence, in a populous place. The evidence also shews that the screw coupling was not so securely fastened as to prevent its being tampered with. If this was an accident which, in the circumstances, the defendants might have foreseen, then none of the authorities that have been cited affect the plaintiff's right to relief. In *Dixon* v. *Bell* (1) Lord Ellenborough C.J. puts the plaintiff's case exactly: "Though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated, the event has unfortunately proved, that the order to Leman was not sufficient; consequently, as by this want of care, the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible." As to *Lynch* v. *Nurdin* (2), so far from its having been doubted, it has been expressly approved of in *Harrold* v. *Watney*. (3)

[VAUGHAN WILLIAMS L.J. I was a party to the decision in that case. It was a case just on the border-line, and I should not have concurred had not the conclusion arrived at by the Court been justified by the authorities upon nuisance.]

The passage quoted by the learned judge, in giving judgment in this case, from *Lynch* v. *Nurdin* (2) governs this case, and his exposition of the law was, upon the findings of the jury, correct.

VAUGHAN WILLIAMS L.J. In my judgment this appeal must be allowed. I think the case may be shortly put thus: that at the conclusion of the plaintiff's case there was really

(1) 5 M. & S. 198; 17 R. R. 308. (2) 1 Q. B. 29; 55 R. R. 191.
(3) [1898] 2 Q. B. 320.

no case to go to the jury at all—no evidence of the neglect on the part of the defendant railway company of any duty the neglect of which would have led to this accident.

But I will deal with the case on the findings of the jury. I do not propose to discuss which way the balance of evidence is, or as to whether the verdict was against the weight of evidence. I propose to deal with the case upon this question: Was there really any reasonable evidence to go to the jury, in respect of those findings of the jury, so far as they are findings, which are against the defendants?

Now, the first question put to the jury was, "Was the van, in regard to persons using the highway where the plaintiff was, in a safe position as and where it was left by the defendants' servants on July 20th, unless interfered with afterwards?" The answer is, "Yes." There is no negligence thus far. The railway company put their van in a perfectly safe position. Then the second question is, "Would the accident to the plaintiff have happened if the van had not been interfered with?" Answer, "No." Then the third question is, "Was the interference the act of trespassers, and, if so, was the interference with the wilful intent of causing the van to descend the incline, or merely negligent?" Answer, "Yes; the act of trespassers with negligence."

Now, thus far in the findings there is nothing to shew any negligence whatsoever by the railway company. Before I go to the next two questions I wish to point out that this van was not only placed in a position where it was safe, but also that it was placed there under conditions to make it safe. It was locked up, it was braked, and it was coupled by a screw coupling to the train. Under those circumstances, for this interference by these boys, who were so neglectful of the safety of other people, to cause that to happen which did happen, they had to go through a very considerable operation. They had to break into the van, or get into it with keys, which it is suggested they did; and when they got there they had a great deal to do before this van could be loosed and allowed to run down the incline. That being so, the fourth question was, "Was the danger of such interference causing injury to persons

C. A. 1903

McDOWALL v. GREAT WESTERN RAILWAY.

Vaughan Williams L.J.

using the highway known to the defendants at the time when the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?" Answer, "Yes; it was known and could have been guarded against by the exercise of reasonable care on the part of the defendants."

Now, let me take that question in two halves. "Was the danger of such interference causing injury to persons using the highway known to the defendants at the time when the van was left and kept where it was?" Let us see what the facts are here. It is quite true that the boys had been in the habit of breaking into the vans or trucks standing on this part of the line and stealing apples and doing one thing and another; but although it is said the boys had been doing this for years, there is no evidence that they ever loosed a van or vehicle before during all that time; and therefore it seems to me there is nothing in the past history of the conduct of those boys, as regards vehicles left on the rails at this point, to lead one to anticipate that they would go and uncouple a vehicle and let it down the incline as they did in the present instance.

Under those circumstances it seems to me that there was no evidence to go to the jury upon which they could properly find that the danger of such interference causing injury to persons using the highway was known to the defendants at the time when the van was left and kept where it was, and might have been sufficiently guarded against by the exercise of reasonable care on the part of the defendants. There, again, I do not understand what the suggestion is. The suggestion made by the learned counsel for the plaintiff seems to be that the defendants might have put the van the other side of the catch-point, and then it could not have gone down the incline. But it is not true to say absolutely that if the defendants had done so it could not have gone down the incline, and it is not true to say that upon the other side of the catch-point it would have been safe. The truth of the matter is that, if it had been placed there, all these boys would have had to do was to open or close, as the case might be, this catch-point and let the van go by, which would have been a very much simpler operation

than that they went through when they got into the van, of uncoupling and unbraking the van.

Then the fifth question is, "Was the occurrence of injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants' servants in placing and keeping the van as and where it was placed by them, either (1.) in regard to its position, apart from interference by trespassers; or (2.) in regard to its danger if interfered with; or (3.) in any other way?" Answer, "Yes; the company were negligent in not placing the van to the east of the catch-point." There again, in my judgment, there is nothing to justify the finding that the not placing the van to the east of the catch-point was an effective cause of the accident which occurred.

Now, having said so much as to the findings, I will try to state in a few words what I consider to be the law applicable to this case. I do not think that Mr. Williams was wrong when he said that, in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury. Of that proposition I do not think the counsel for the plaintiff can complain. It is at all events sufficiently liberal in their favour.

Now, assuming that to be the law, I am of opinion, for the reasons I have already given, first, that there was nothing in the circumstances of this case which would induce an ordinary person of common sense and care to do anything more than the railway company did in respect of this van and the keeping of it in the place where it was kept, under the conditions in which it was kept; and of course if that is so, there is an end of the case altogether. But let me for a moment assume that

C. A. 1903

McDOWALL v. GREAT WESTERN RAILWAY.

Vaughan Williams L.J.

there was evidence to go to the jury of neglect by the defendants of that care which a reasonable man would have taken to avoid what I may shortly call "obvious dangers." Even in that case it seems to me that the rule which was laid down by Lord Esher in *Engelhart* v. *Farrant* (1) is the rule which we must apply. He says this (2): "If a stranger interferes it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is the effective cause of the accident." Even assuming any neglect of duty here by the railway company, what one has to ask oneself is this: "Was the neglect by the railway company of precautions the effective cause of this accident? I confess I think, on this evidence, such neglect was not the effective cause of this accident, and, as Lord Esher says, if it was not, that means that the defendants are not liable.

Under these circumstances, what, in my judgment, we ought to do here is to allow this appeal and to order judgment to be entered for the defendants.

ROMER L.J. I am of the same opinion. Clearly, as found by the jury when this train was left where it was by the railway company, with the precautions taken by them, it was perfectly safe. It was not left in any condition in which it could be said that there was any negligence on the part of the railway company under the circumstances, unless you can find some evidence of negligence by reason of the evidence relating to the mischievous boys; in other words, unless it is plain that the evidence relating to the mischievous boys turned that act which was otherwise a proper act on the part of the company into a negligent one. Upon that, having considered that evidence, it does not appear to me that upon it the jury could reasonably find that the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did, or that there was at the time, known to the company, any such risk of the particular acts of the boys which caused the accident as called upon the railway company

(1) [1897] 1 Q. B. 240. (2) [1897] 1 Q. B. at p. 243.

to take further precautions against those particular acts; and that being so, it appears to me that the findings upon which the learned judge below acted cannot be relied upon on behalf of the plaintiff, and that the appeal ought to succeed.

Stirling L.J. I am of the same opinion. The real question in this case is whether the findings of the jury in answer to the fourth and fifth questions which were put to them by the learned judge can be supported. In answer to the first three questions the jury have found that the van was in a safe position as and where it was left by the defendants' servants, unless interfered with afterwards, and that the accident would not have happened if the van had not been interfered with, and that the interference was the act of trespassers, who acted negligently. Then what really happened was that some boys got into or on the van and undid the brake and couplings, and that this led to the accident.

Now, was there any evidence to shew that the company ought reasonably to have anticipated such an occurrence? The learned judge, twice in the course of his judgment, states what the facts are. He says that for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about vehicles standing upon it, and later on he says that, to the knowledge of the defendants, the boys used to get into trucks and vans and unlock the doors of the vans on the siding. That is the whole length the evidence went. Nothing further has been called to our attention. That had gone on for years, and no accident of any kind had occurred. In these circumstances it does not seem to me a fair inference to draw that the company ought to have reasonably anticipated any such act as was actually done by the boys in this case, or the result which came from it. Upon that ground I think the appeal ought to be allowed.

Appeal allowed.

Solicitor for appellants: *R. R. Nelson.*

Solicitors for respondent: *A. R. & H. Steele, for W. J. Jones, Haverfordwest.*

G. I. F. C.

C. A.
1903
June 19, 20.

[IN THE COURT OF APPEAL.]

In re G. E. B., A DEBTOR.

Bankruptcy—Bankruptcy Notice—Set-off—Mutual Credits—Judgment Debt—Limited Company — Winding-up — Shareholder — Calls, Action for — Application to set aside Bankruptcy Notice—Set-off to be enforceable at time of hearing Application—Bankruptcy—Discharge of Debt by Set-off—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 38.

On an application by a judgment debtor to set aside a bankruptcy notice on the ground that he has a set-off against the judgment debt within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883—which enacts that a debtor commits an act of bankruptcy if he does not either comply with a bankruptcy notice demanding payment of a judgment debt, "or satisfy the Court that he has a . . . . set-off . . . . which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained"—he must satisfy the Court that he has, not merely an inchoate right of set-off which may, in the event of bankruptcy, ripen into an effective set-off under s. 38, but an effective set-off existing at the time the application is heard, that is, a set-off of a debt then capable of being enforced by action.

Thus, where the liquidator of a limited company in liquidation under a supervision order has obtained judgment in an action against a shareholder for unpaid calls, the judgment debtor cannot, upon an application by him to set aside a bankruptcy notice for payment of the judgment debt, claim to set off a debt alleged to have become due to him from the company prior to the liquidation; for, until after a receiving order has been made against him, he cannot set off against his unpaid calls the debt due to him from the company: see *Grissell's Case*, (1866) L. R. 1 Ch. 528.

Per Romer L.J: A bankruptcy notice issued in respect of a judgment debt is not of necessity bad because, if bankruptcy ensues, the debt will be discharged by a set-off.

ON August 13, 1900, at a meeting of the Prospecting and General Developing Company of West Australia, Limited, a resolution was passed for a voluntary winding-up, and on September 26, 1900, an order was made to continue the winding-up under the supervision of the Court, and liquidators were appointed. That order was made upon a petition presented by the debtor, claiming to be a judgment creditor of the company for 402*l.* 10*s.* 8*d.*, under a judgment obtained by him on August 24, 1900, and also to be a creditor for the

further sum of 4945*l.* 0*s.* 6*d.* due to him from the company for an overdraft guaranteed by him to the company's bankers, under which guarantee he alleged that he had since paid 1100*l.*

The debtor was himself a shareholder in the company, and in the course of the winding-up the liquidators obtained a judgment against him for 138*l.* 16*s.* 4*d.* in respect of unpaid calls on shares. On April 21, 1903, the debtor was served by the liquidators with a bankruptcy notice for the amount of that judgment, whereupon he presented an application to have that notice set aside. In support of his application he filed an affidavit stating that he had been unable, in the action in which the judgment for unpaid calls had been obtained against him, to set off his claims against the company. In reply to that affidavit the liquidators filed an affidavit stating that on March 23, 1901, they had, in pursuance of an arrangement made between the debtor and themselves as liquidators, and with the sanction of the Companies Winding-up Court, transferred to the debtor certain shares held by the company in a syndicate, and that the same had been accepted by the debtor (as shewn by his receipt produced) "in full satisfaction, discharge, and settlement of" his judgment debt against the company for 402*l.* 10*s.* 8*d.* As to the debt claimed to be due from the company to the debtor on his guarantee, the liquidators stated that the debtor was a member of a firm who were the agents of the company in West Australia, and that the company's bankers there were also the bankers of the debtor and his firm; that those bankers held security for the amount of the company's indebtedness to them, but whether they were fully secured the liquidators were unable to say; and that the London agents of those bankers had given the liquidators notice of a claim, which, however, pending the realization of the security, they had not yet admitted. They further stated that until they had seen a copy of the debtor's affidavit they had not received any notice from him that he had paid or claimed the 1100*l.* or any sum whatever.

The registrar refused to set aside the bankruptcy notice, and dismissed the debtor's application with costs.

C. A. 1903

G. E. B., *In re.*

The debtor appealed.

The appeal was heard on June 19 and 20, 1903. (1)

Whinney, for the debtor. The bankruptcy notice should, it is submitted, have been set aside. It is true that, as was decided by this Court in *Grissell's Case* (2), a shareholder in a limited company cannot, in the winding-up of the company, set off a debt due to him from the company against unpaid calls upon his shares. But if the shareholder is a bankrupt different considerations apply. Then the mutual credit section—s. 38

(1) The following sections of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and rules of the Bankruptcy Rules, 1886, were referred to in the course of the argument:—

Sect. 4, sub-s. 1: "A debtor commits an act of bankruptcy in each of the following cases: . . . . (*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereof not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

Sect. 38: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."

Rule 138: "(2.) There shall also be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar."

Rule 139: "The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall fix a day for hearing the application. . . . ."

(2) L. R. 1 Ch. 528.

of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)—applies, and in bankruptcy the debt due to the shareholder can be set off against calls on his shares: *In re Duckworth* (1); *In re Universal Banking Corporation.* (2) In coming into bankruptcy the liquidator submits to a different jurisdiction—that of the Court of Bankruptcy.

[VAUGHAN WILLIAMS L.J. Here the question is whether an act of bankruptcy has been committed.]

The debtor is entitled to shew that he has not committed an act of bankruptcy.

[VAUGHAN WILLIAMS L.J. In the liquidation the claim for calls is made on behalf of the company and also their creditors, but the debt is due from the company only.]

The debtor ought not to be made a bankrupt in respect of a debt which could not be proved in the bankruptcy. If a receiving order were made, the judgment debt here would be at once extinguished by the operation of s. 38; and, therefore, the Court would, in the exercise of its discretion under s. 7, dismiss the petition. The bankruptcy notice could not result in payment of the judgment debt; it is used only for the purpose of putting pressure on the debtor. This is an abuse of the process of the Court which the Court will not permit: *Ex parte Griffin.* (3) And so, in the analogous case of a company, the Court will prevent an abuse of the process of the Court by using a winding-up petition for the purpose of extorting money: *In re A Company.* (4)

Hansell, for the liquidators. The registrar's decision was right. The cases shew that where a limited company is in liquidation, a contributory cannot set off against his liability for calls on his shares a debt due to him by the company, unless he be a bankrupt. The right to set off a debt against calls arises under s. 38 of the Bankruptcy Act, but that section does not apply until a receiving order has been made.

[VAUGHAN WILLIAMS L.J. The bankruptcy notice is a step in proceedings in the bankruptcy jurisdiction. In the winding-up you cannot have the set-off, because the persons making

(1) (1867) L. R. 2 Ch. 578.
(2) (1870) L. R. 5 Ch. 492.
(3) (1879) 12 Ch. D. 480.
(4) [1894] 2 Ch. 349.

C. A. 1903

G. E. B., *In re.*

the claims are not the same. In bankruptcy the claim for calls is made by the company only, not by the company and the creditors.]

It makes no difference which way the balance lies. The reason why the set-off is allowed in bankruptcy is that the creditor is then subject to the bankruptcy jurisdiction. The want of mutuality is cured only by the mutual credit section, which has no operation until a receiving order has been made.

[VAUGHAN WILLIAMS L.J. Does not the receiving order when made relate back?

ROMER L.J. A bankruptcy notice is a proceeding in bankruptcy.]

On an application to set aside a bankruptcy notice the Court cannot go behind the judgment: *In re Easton.* (1)

[VAUGHAN WILLIAMS L.J. referred to *In re Lennox* (2); *Ex parte Kibble.* (3)]

Non-compliance with a bankruptcy notice is an act of bankruptcy, unless the conditions mentioned in s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, are fulfilled.

[VAUGHAN WILLIAMS L.J. A bankruptcy notice is a step in bankruptcy. If the Court in the exercise of its discretion would not make a receiving order by reason of the right of set-off, it may be that the creditor is not entitled to issue a bankruptcy notice.

ROMER L.J. Bankruptcy proceedings are of a quasi-criminal nature. If they cannot result in payment of the debt, why should they not be stopped at the outset, instead of waiting until the mischief has been done?]

There may be some hardship on the debtor, but a bankruptcy notice is not a greater hardship than an execution levied by seizure and sale, which is also an act of bankruptcy.

Other creditors can take advantage of the act of bankruptcy committed by non-compliance with a bankruptcy notice: why should they be deprived of that advantage? The capacity to present a successful bankruptcy petition is not the test of the right to issue a bankruptcy notice. If in the action the

(1) (1893) 10 Mor. 111. (2) (1885) 16 Q. B. D. 315.
(3) (1875) L. R. 10 Ch. 373.

debtor could have set up a counter-claim, the counter-claim is not an answer to the bankruptcy notice, but the debtor could avail himself of it on a bankruptcy petition.

[ROMER L.J. In *In re Larard* (1) the Court of Appeal dismissed a bankruptcy petition on the ground that it was vexatious and an abuse of the process of the Court: why is not the issue of a bankruptcy notice as much a step in bankruptcy as the presentation of a petition?]

The basis of the decision in *In re Duckworth* (2) was that there was an existing bankruptcy. There is no existing bankruptcy here, and the act of bankruptcy will enure to the benefit of other creditors.

[VAUGHAN WILLIAMS L.J. referred to *Brighton Arcade Co.* v. *Dowling* (3), which was disapproved by Jessel M.R. in *In re Whitehouse & Co.* (4)]

In the latter case Jessel M.R. said that the right of set-off could be conferred only by statute, and that the onus lies on the person who claimed to shew that it existed. The most recent case on the subject is *In re Hiram Maxim Light Co.* (5), in which it was held that when, in an action by a going company against a shareholder for a call, he by his defence claimed a set-off, and before judgment the company went into liquidation, the debt due by the company to the shareholder could not be set off in the winding-up against the call. It is suggested that the issue of the bankruptcy notice must be an abuse of the process of the Court, because, even if the judgment creditor did get a receiving order, he would get nothing out of the bankruptcy; but there is no evidence of bad faith on the part of the judgment creditor, and indeed that question was not gone into before the registrar at all.

[ROMER L.J. The Bankruptcy Rules 138 (2.) and 139 seem to negative the idea that a debtor who claims a set-off cannot apply to set aside a bankruptcy notice. Here the debtor says, "I have a set-off which I could not set up in the action: I want to set aside this notice." Why should he not apply?]

(1) (1896) 3 Mans. 317.
(2) L. R. 2 Ch. 578.
(3) (1868) L. R. 3 C. P. 175.
(4) (1878) 9 Ch. D. 595.
(5) [1903] 1 Ch. 70.

C. A. 1903

G. E. B., *In re.*

The set-off must, in order to support the application, be a set-off existing at the time the application is made: *In re Isaac.* (1) Here the debtor could not set off the debt due to him from the company until he had paid his calls.

Whinney, in reply.

[VAUGHAN WILLIAMS L.J. referred to *Sankey Brook Coal Co., Ld.* v. *Marsh* (2), and

ROMER L.J. to Buckley on Companies, 8th ed. p. 328.]

VAUGHAN WILLIAMS L.J. This is a case of considerable difficulty. We are to assume for the purpose of this hearing that there is, as between the company, who have a claim for unpaid calls, and the defendant, who is a shareholder in the company, a claim for moneys due from the company to him which in point of amount would overtop the claim for the calls.

Now this company is in liquidation, the result of which is this—that the statute in relation to companies, the Companies Act, 1862, makes such provisions as to what shall be done in the event of liquidation that, after liquidation, the cross-claim by the defendant, the shareholder, against the company could not be set up by him in the action. The real reason for that is that, in such a case, although the action, even after the liquidation, is an action which is brought in the name of the company, in substance it is an action which is brought by the liquidator on behalf of the creditors of the company for the amount due from the shareholder to the creditors. The result of that conclusion is, as stated by Bramwell B. in *Sankey Brook Coal Co., Ld.* v. *Marsh* (3), that there is a want of mutality. "I think," he says, "these debts are in substance not mutual, but that the real plaintiff is the liquidator and that the debt sued for is really due to the body of creditors." So that it is on behalf of the creditors that the liquidator brings the action. The result of that is this—that, assuming the claim of the shareholder against the company to overtop the debt for calls, the shareholder could not set up that defence against the liquidator.

(1) (1885) 2 Mor. 258, 260. (2) (1871) L. R. 6 Ex. 185.
(3) L. R. 6 Ex. 185, 189.

It is not that a time might arrive presently on the happening of which the defendant would be able to rely upon this set-off: it is that the want of mutuality will form a complete answer to any claim by the defendant to set up this defence against the claim of the liquidator for calls.

Now, in this case there has been a claim by the liquidator, followed by a judgment in the King's Bench Division, for the amount of calls unpaid by the defendant. Of course no defence by way of set-off or otherwise could have been set up against that claim. In that state of things the liquidator has been minded to issue a bankruptcy notice under clause 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. The clause is one of the clauses in that section detailing the acts of bankruptcy, and is as follows: [The Lord Justice read the clause, and continued:—]

Now, there can be no doubt that in the present case the creditor has obtained his final judgment, and there can be no doubt that he has served the bankruptcy notice, and I do not understand it to be suggested that the debtor has in any way complied with the terms of that bankruptcy notice. He has not paid the judgment debt in accordance with the terms of the judgment; he has not secured or compounded it to the satisfaction of the creditor or the Court. Under those circumstances, the only course really open to the debtor, if he wishes to avoid committing this act of bankruptcy, is to have the bankruptcy notice set aside upon grounds which, under the terms of the section, are admissible.

Now, what is said by the debtor here is that he has a set-off which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which judgment was obtained. It is not disputed, in fact it is common ground, that he could not set up this set-off in the action in which the judgment was obtained. He could not do so by reason of the want of mutuality. The debtor says that, although he could not do so, yet by virtue of the terms of the 38th section of the Bankruptcy Act, 1883—a section which takes effect when a receiving order has been obtained, and takes effect from the date of the receiving order—there is an effective set-off which can be set up against this claim of

C. A. 1903

G. E. B., *In re.*

Vaughan Williams L.J.

the judgment creditor, and which entitles him to have this bankruptcy notice set aside. He contends further that the bankruptcy notice is a first step in bankruptcy, and also that by the very terms of the provisions of the 7th section of this Act, when the petition for a receiving order comes on to be heard, the Court, in the exercise of its discretion, would not make a receiving order if they found that there really was such a set-off to this debt as, if set up in the administration in bankruptcy, would put an end to any effective claim by the judgment creditor for the amount of the judgment.

What, then, we have to consider is whether that claim by the debtor is well founded. In my judgment, the question whether that contention by the debtor can be supported depends upon the terms of the 4th section, sub-s. 1 (*g*), which I have already read. Has the debtor satisfied us that "he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained"? As to the latter part of the clause, there is no doubt he could not set up any set-off in the action. Then has he a counter-claim, set-off, or cross demand which, apart from that, he could set up at all? One must ask oneself at what point of time. It is quite plain, indeed it is common ground, that at the time when the action was brought and the judgment was obtained he had not a set-off equalling the amount of the judgment debt. To what time is it that these words "he has" refer? It seems to me that those words must refer to the time of the hearing of the application to set aside the bankruptcy notice. Then, had he a set-off at that moment? He clearly had not a set-off in respect of which, at that moment, he could bring an action; for, as pointed out by Bramwell B. in the judgment to which I have already referred, it is plain that the defendant could not maintain an action against the company for this cross-claim—that is to say, he had not, at the moment when the application to set aside the judgment summons was heard, an effective set-off which he could enforce at that moment.

What does this sub-s. 1 (*g*) of s. 4 mean? Does it mean that at the moment of the hearing of the application the debtor

must have an effective set-off which he could enforce by action; or is it sufficient that at that moment he has vested in him a right of set-off which, when the proper time comes in bankruptcy, could be used for the purpose either of reducing or wiping out this judgment debt? Now, in this case he has the latter—that is, an existing right of set-off—but not the former—that is, an effective set-off which he could enforce by action; and the question we have to answer is whether it is sufficient that he has the latter—that is to say, a right of set-off which is existing, but which can only be effectively used after the making of the receiving order in the bankruptcy proceedings.

Now, not without considerable doubt, I have come to the conclusion that the words of this clause refer to a set-off which can be enforced at the moment of the hearing of the application to set aside the bankruptcy notice. It must be remembered that the persons who are claiming the judgment debt at that moment are the creditors, as represented by the liquidator, and nothing has happened since the judgment to prevent their having that character. At the moment of the hearing of the application to dismiss the bankruptcy notice, these creditors, as represented by the liquidator, are making no claim upon the basis of this judgment debt in any bankruptcy administration. It is quite possible that there never may be a petition founded on this act of bankruptcy presented by the judgment creditors, or by any one else; and it is also quite possible that, even if there is a petition, either by the judgment creditors or by any other creditor on the basis of the act of bankruptcy, there may be no receiving order. It seems to me that the meaning which I have put upon the words in the earlier part of the clause is very much supported by the words at the end—"which he could not set up in the action in which the judgment was obtained."

Now, in this particular case it is true the debtor cannot set up the set-off because of this want of mutuality; but it is possible that there might be a defendant who through carelessness, or for some other reason personal to himself, did not care to set up the set-off. Now, we will take that case, and we will suppose the debtor had a set-off and could, if he had chosen,

C. A. 1903

G. E. B., *In re.*

Vaughan Williams L.J.

have relied upon it as a defence to the action. Judgment is obtained against him without reference to that set-off. A bankruptcy notice is issued. Could he have that bankruptcy notice set aside? Clearly not, if one has regard to the words "and which he could not set up in the action in which the judgment was obtained." The Act of Parliament expressly prevents his relying upon a set-off as a ground for setting aside the bankruptcy notice in a case in which he could have set it up but did not.

But all these arguments, based upon the bankruptcy—based upon the fact that, in the event of bankruptcy, there could be a set-off under the 38th section—apply just as much to the case where the debtor neglected to set up a set-off which he could have set up, as they do to a case where there is a set-off which he could not rely upon; and, I take it, it is perfectly plain that the result of failing to set up the set-off which might have been set up does not satisfy the debt in respect of which the set-off is based. On the contrary, if a receiving order is made and an account is taken under the mutual credit clause, s. 38, it is quite plain in bankruptcy that, although the debtor has not chosen to set up the set-off in the action, the creditor would have to give credit to the set-off when it comes to proof of debts on the account taken under the mutual credit section. And that is quite right, for this reason—that if it were not so it would be doing great injustice to the general body of creditors, because, there being a fund upon which the creditors are entitled to come, the neglect of the debtor to set up his set-off would enable some creditor to rank upon that fund who, as against the other creditors, has no right to do so.

Under those circumstances, it seems to me that we ought to construe this section as meaning a counter-claim, set-off, or cross demand, which is effective at the time of the hearing of the application to set aside the bankruptcy notice.

The only other matter that I think it necessary to refer to is the suggestion that in the event of a receiving order there will be a relation back of the title of the trustee, or whoever may be the representative of the creditors, to the time of the committing of this act of bankruptcy by non-compliance with the bankruptcy notice. But it seems to me the answer to that is

the same I have just given to the other points which were brought forward in this case—that is to say, that it goes too far. If it is true, it would just as much cover the case where there is neglect by the debtor to set up the set-off as a case where he could not set up the set-off; and this makes it obvious that he is not to be allowed to set aside the bankruptcy notice where the set-off is one which the debtor could have set up but has neglected to do so.

For these reasons I have come to the conclusion that this appeal fails, and it must be dismissed with costs.

ROMER L.J. I also think that the appeal fails.

This case cannot be dealt with on the footing that what the creditor has done in issuing the bankruptcy notice was an abuse of the process of the Court. There is nothing in this case to shew any bad faith on the part of the liquidator. Indeed, bad faith has not been suggested, nor has the question as to the abuse of the process of the Court been gone into at all or been considered by the registrar. In fact, there appears, as I understand, to be a dispute between the parties as to whether or not the set-off claimed on behalf of the debtor does or does not equal the amount of the judgment debt; and if there was, as there well might have been, a bonâ fide opinion on the part of the liquidator that the set-off was not equal to the amount of the judgment debt, he is well entitled to issue his bankruptcy notice and to have that question determined, and, if determined in his favour, to be able to take further bankruptcy proceedings and obtain an adjudication. It appears to me, therefore, that the contention that the application by the liquidator was an abuse of the process of the Court cannot, under the circumstances of the case, be maintained.

Then I proceed to consider whether the appellant can succeed on any other ground; and I am bound to say I can find no satisfactory ground on which to allow the appeal, although personally I should have been very disposed, if I could have seen my way to do so, to support by my judgment the position of the appellant. But at the time when this bankruptcy notice was issued, and at the time the application to discharge it

C. A. 1903

G. E. B., *In re.*

Romer L.J.

came before the registrar, it is clear that, the judgment debt being one for calls in the winding-up of the company, no set-off could be urged by the debtor in respect of a debt due to him from the company, because, having regard to the provisions in the Companies Act, 1862, unless and until bankruptcy supervenes, the two debts in substance give different rights. The debt due for calls, though nominally due to the company, is really not so much a debt due to the company as a liability to contribute to the assets. In the winding-up of this company the rights of the creditors have supervened, and they have rights beyond such as the company would have had against their debtor if there had been no winding-up. It is true that, if bankruptcy of the debtor were to ensue, there would be a right of set-off, the reason in that case being that the rights of the creditors of the bankrupt have supervened, and you have then to deal with double rights, namely, the rights of the creditors of the company, and the rights of the creditors of the bankrupt. Those rights are equal, and the only way of dealing with the difficulty in that case is to treat the mutual rights as if they were the rights, the old rights, of the debtor in his individual capacity and of the company in its individual capacity, and so the right of set-off accrues and must be enforced.

It is said that the principle of there being no right of set-off by a debtor in such a case as this until bankruptcy supervenes would even prevent the Court of Bankruptcy from refusing adjudication on a petition presented by the liquidator in respect of the debt due to the company. But that is not so, for the Court has a judicial discretion as to whether it will or will not adjudicate a man bankrupt on a creditor's petition; and I think that in such a case as we have to deal with here, in ordinary circumstances the Court would, in the exercise of its discretion, refuse to make the debtor bankrupt on the petition of the liquidator, because the very fact of an order being made adjudicating the man bankrupt at the instance of the liquidator would cause the right of set-off to accrue, and so destroy the position of the petitioning creditor. I have been trying to ascertain whether there is a general principle that a bankruptcy notice should not be issued in respect of a debt if, on the

bankruptcy, that debt would be discharged by a set-off. I should have been glad if I could have found such a principle available for us in this case, but it appears to me that the provisions of the Bankruptcy Act prevent us saying there is any such principle. On looking at the words of s. 4 of the Bankruptcy Act this is clear, that it contemplates that a bankruptcy notice may be issued by a person who has obtained judgment against a debtor for a debt, even if that debtor has a set-off of equal or greater amount, but had not pleaded it in the action in which the judgment was obtained. In that case it is clear that adjudication could not be made at the instance of the creditor who had obtained the judgment, and that the Act clearly contemplates that notwithstanding that fact he could issue a bankruptcy notice in respect of his judgment debt.

I cannot, therefore, find the existence of the principle which would enable the appellant to succeed in this case, and, in the absence of a principle and in the absence of any legitimate ground on which I could enable the appellant to say he is entitled to discharge this bankruptcy notice, I regret to say I think the appeal fails and must be dismissed with the usual consequences.

Stirling L.J. I have felt great difficulty in arriving at the conclusion to which my learned brethren have come, and with which I agree. The reasons for my conclusion have already been given by both my learned brethren, and I cannot usefully add anything to them. I do not wish, therefore, to express any further opinion.

Whinney, for the debtor, asked that time might be given to his client to enable him to raise funds so as to avoid committing an act of bankruptcy.

Hansell, for the judgment creditor, not objecting,

Their Lordships extended the time for complying with the bankruptcy notice to seven days from the present date.

Appeal dismissed.

Solicitors: *Blair & W. B. Girling; Haslam & Co.*

G. I. F. C.

C. A.
1903
June 30;
July 1.

[IN THE COURT OF APPEAL.]

ISLINGTON BOROUGH COUNCIL *v.* LONDON SCHOOL BOARD.

London—Poor-rate—Lands taken Compulsorily—Deficiency in Assessment to Poor-rate — Liability of Promoters of Undertaking — General Rate — Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 2.

By s. 133 of the Lands Clauses Consolidation Act, 1845, promoters of undertakings to whom that Act applies who become possessed of lands liable to be assessed to the poor-rate are to make good the deficiency in that rate caused by their taking or using the lands for the purposes of their works until their works are completed and assessed to the poor-rate.

By s. 10, sub-s. 2, of the London Government Act, 1899, the general rate and the poor-rate are to be assessed, made, and levied together by the borough council as one rate, termed the general rate, which is to be assessed, made, collected, and levied as if it were the poor-rate, and all enactments referring to the poor-rate are (subject to the provisions of the Act as to audit) to be construed as referring also to the general rate:—

Held, that promoters who in the exercise of their statutory powers had compulsorily taken land in London since the coming into operation of the London Government Act, 1899, were only liable to make good the deficiency in so much of the general rate as represented the poor-rate or anything chargeable on that rate, and were not liable to make good the whole of the deficiency in the general rate.

Decision of Wright J., [1902] 2 K. B. 701, affirmed.

APPEAL of plaintiffs from a decision of Wright J. (1)

The question in this case was whether under s. 133 of the Lands Clauses Consolidation Act, 1845 (2), and sub-s. 2 of s. 10 of the London Government Act, 1899 (3), the defendants were

(1) [1902] 2 K. B. 701.

(2) Sect. 133 of the Lands Clauses Consolidation Act provides: "That if the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works. . . ."

(3) Sub-s. 2 of s. 10 of the London Government Act, 1899, enacts as follows: "After the appointed day the general rate and the poor-rate shall be assessed, made, and levied

liable to make good to the plaintiffs the whole deficiency in the assessment to the general rate, as defined by the last-mentioned Act, on a house and lands known as No. 7, Barnsbury Park, Islington, by reason of the premises having been compulsorily taken by the defendants under their statutory powers for the purposes of certain works of the defendants, until the works should be completed by the defendants and assessed to the general rate, or only the deficiency in the proportion of the general rate which represented the poor-rate. The facts are fully stated in the report of the decision in the Court below.

Wright J. held that the defendants were bound only to make up the deficiency of that part of the general rate which represented the poor-rate, or anything chargeable on that rate.

Danckwerts, K.C., and *Ryde*, for the plaintiffs, urged the same arguments as in the Court below, and, in addition to *Farmer* v. *London and North Western Ry. Co.* (1), cited—as to the liability of promoters under s. 133 of the Lands Clauses Consolidation Act, 1845, to make good the deficiency in the poor-rate caused by their taking land or houses, and as to the mode in which the deficiency was to be computed—*Overseers of Putney* v. *London and South Western Ry. Co.* (2), *Vestry of St. Leonard, Shoreditch* v. *London County Council* (3), and *Mayor of London* v. *St. Andrew, Holborn.* (4)

Horace Avory, K.C., and *Layman*, for the defendants, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Wright J. ought to be supported. I propose to say very little about the matter, because really I adopt, not only his judgment, but the reasons which he has given for it. Counsel for the

---

together by the borough council as one rate, which shall be termed the general rate, and shall be assessed, made, collected, and levied, as if it were the poor-rate, and all enactments applying or referring to the poor-rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate."

(1) (1888) 20 Q. B. D. 788.
(2) [1891] 1 Q. B. 440.
(3) [1895] 2 Q. B. 104, 108.
(4) (1867) L. R. 2 C. P. 574.

C. A. 1903

ISLINGTON BOROUGH COUNCIL v. LONDON SCHOOL BOARD.

Vaughan Williams L.J.

appellants have both referred to *Farmer* v. *London and North Western Ry. Co.* (1) as if it was a strong authority applying to this case. To my mind it only applies in this sense, that it is a guide to us as to what we must look for in order to make s. 133 of the Lands Clauses Consolidation Act, 1845, apply in the present case. The question which Field and Wills JJ. put to themselves in that case had reference to the borough rate and the county rate, and they asked themselves whether there was anything in the Acts of Parliament regulating those two rates which brought them respectively within the operation of the words of the Lands Clauses Act, and they found in that case that which was sufficient to make s. 133 apply to those rates. What they found upon looking into the Acts of Parliament was that these rates were really poor-rate—that is to say, were either poor-rate or charged on poor-rate. It is a similar question which we have to ask ourselves here, and when I look at s. 10 of the London Government Act, 1899, though I do not say that there are no arguments which might be properly addressed to us inviting us to put such a construction on this section as that the whole of the general rate, irrespective of the purposes for which it was raised, ought to be considered poor-rate for the purposes of s. 133 of the Act of 1845, still, in my judgment, the language of s. 10 of the Act of 1899 is not sufficient to extend the liability of the defendants to the deficiency in the whole of the general rate. If that had been the intention of the Legislature, it would have been very easy to have made this section perfectly clear; but that has not been done. If the Legislature had said that the general rate was to be deemed the poor-rate, no question such as we have before us in this case could have arisen. When I pressed Mr. Danckwerts with that observation, his answer was that the modern practice of legislation was to wrap up a bill which it was wanted to pass through Parliament in such a way as to make it less likely that there would be obstruction. In other words, he meant, for his language is susceptible of no other meaning, that the provisions of the bill were to be wrapped up in such a way that Parliament should not recognise what was being done. I deny that there

(1) 20 Q. B. D. 788.

is any such practice in Parliament. It follows, if Mr. Danckwerts' argument is right, that what might have been expressed in clear language has been intentionally expressed in such a way that it can only be inferred from a minute examination of the words of the section. I entirely agree with Wright J. that the form of ss. 10 and 11 would be a strange form to adopt if the intention were to impose a novel burden of this kind, especially when it is remembered that s. 133 of the Act of 1845 is not concerned with rating at all, and that whereas ss. 10 and 11 are entirely concerned with rating, s. 133 is concerned merely with the making up of the deficiency in the rate. I cannot believe that if the Legislature had intended to impose a novel burden on promoters of undertakings, and to alter their liability in this very strong manner, they would not have expressed their intention in clear terms. The appeal must be dismissed.

ROMER L.J. I have come to the same conclusion. Certainly the Act of 1899 has not—nor has the Islington scheme—expressly cast upon the defendants such an additional burden as is suggested; nor ought it to be inferred that such an additional burden is cast upon them unless the inference is necessary having regard to the nature of the scheme. To my mind such an inference is not necessary. After the elaborate judgment of Wright J., with whose criticisms on the various enactments under consideration I in substance agree, I do not think it necessary to go through those enactments in detail. I can only say that I entirely concur in the concluding part of his judgment, where he says "that the true meaning of the enactments when read together is that the school board must make up the deficiency of that part of the general rate which represents the poor-rate, or represents anything chargeable on that rate."

STIRLING L.J. I am of the same opinion. By the Lands Clauses Consolidation Act, 1845, s. 133, the Legislature thought fit to impose on the promoters of an undertaking the liability to make good the deficiency in the poor-rate. Now, at the time of the passing of that Act other rates were known besides the poor-rate. It may be that that rate was a rate which was

C. A. 1903

ISLINGTON BOROUGH COUNCIL v. LONDON SCHOOL BOARD.

Stirling L.J.

levied in all parts of the country, whereas the others were local only; nevertheless the existence of such rates was well known, and the Legislature did not see fit to impose any liability in respect of rates other than the poor-rate. Prior to 1899 four rates were collected in the metropolis, namely, the sewers rate, the lighting rate, the general rate, and the poor-rate. By the London Government Act, 1899, certain alterations were effected in that respect. By sub-s. 1 of s. 10 it is enacted that a scheme under the Act shall provide for the discontinuance of a separate sewers rate and separate lighting rate. So that there is an express direction that those rates shall be discontinued as separate rates. By sub-s. 2 it is enacted that "the general rate and the poor-rate shall be assessed, made, and levied together by the borough council as one rate, which shall be termed the general rate, and shall be assessed, made, collected, and levied as if it were the poor-rate." The language there is different from that of the preceding sub-section. There is no provision for the discontinuance of either the general or the poor-rate. All that is provided is that they are to be assessed, made, and levied as one rate. But it is said that it is to be called the general rate. That is a mere name. Then it is said that this so-called general rate is to be assessed, made, collected, and levied as if it were the poor-rate. That does not make it the poor-rate which, up to this point, remains as part of it only. Then comes this clause: "And all enactments applying or referring to the poor-rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate." The question on that clause is whether upon a fair construction of it the effect is to impose upon promoters of undertakings a liability to make up the deficiency in the general rate, as opposed to the poor-rate. In my opinion that is not a fair construction of this clause. If it were impossible to give effect to the language of the clause in any other way, it might be necessary for the Court so to hold; but it is obvious that the language in itself has a wide application quite apart from the construction contended for, and I do not think that it was intended to have the effect of enlarging the meaning of the words "poor-rate" in s. 133 of

the Lands Clauses Act. There is no authority to the contrary. *Farmer* v. *London and North Western Ry. Co.* (1) is not one. I think that the decision of the learned judge was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *A. M. Bramall; C. E. Mortimer.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1903 *July* 20.

HOARE & CO. *v.* MORSHEAD.

Practice—Application for Judgment under Order XIV.*—Condition of Leave to Defend—Security to Satisfaction of Master—Decision of Master as to Sufficiency of Security — Appeal from Master — Order* XIV., *r.* 6 — *Order* LIV., *r.* 21.

Where under Order XIV., r. 6, leave to defend an action is given to the defendant on giving security for the amount claimed to the satisfaction of a master, there is no appeal from the decision of the master with regard to the sufficiency of the security tendered.

APPEAL from an order of Walton J. at chambers as after mentioned.

The action was brought for the recovery of a sum of money upon a writ specially indorsed under Order III., r. 6. The plaintiffs having applied under Order XIV., r. 1, for liberty to sign judgment for the amount indorsed on the writ, an order was made by a master granting the defendant leave to defend upon giving security for the amount claimed to the satisfaction of the master within a certain time. Upon appeal Phillimore J. affirmed that order, but extended the time specified for perfecting the security. The defendant having tendered certain security, the case came before the master upon the question whether the security so tendered was sufficient; and the master decided that it was insufficient, and directed that the plaintiffs should be at liberty to sign final judgment. The defendant appealed to Walton J. at chambers against the decision of the master

(1) 20 Q. B. D. 788.

C. A. 1903

HOARE & Co. v. MORSHEAD.

that the security tendered was insufficient. The learned judge held that he had no jurisdiction to review the decision of the master with regard to the sufficiency of the security. He therefore made no order, but gave leave to appeal against his decision to the Court of Appeal.

Witt, K.C., and *Pollard*, for the defendant. The principle laid down by the cases is that, where the master acts as the officer of the Court and by virtue of a delegation of its powers, there is an appeal from his decision; but where he does not act as such officer, but merely as a person designated by a statute to perform a certain function, there is no appeal: see *Owen* v. *London and North Western Ry. Co.* (1); *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (2) It is submitted that in such a case as this the master acts as an officer of the Court. It is, under Order XIV., r. 6, for the judge to say on what terms leave to defend is to be given; and, where an order is made that security shall be given to the satisfaction of the master, he really acts, in deciding as to the sufficiency of the security, by virtue of a delegation of the power of the judge to him under Order LIV., r. 12, and his decision must be subject to review by the judge himself. It is provided by Order LIV., r. 21, that "any person affected by any order or decision of a master may appeal therefrom to a judge at chambers."

Loehnis, for the plaintiffs. There is no appeal from the decision of the master as to the sufficiency of the security under an order such as was made in the present case. The judge has power under Order XIV., r. 6, to impose such terms as he thinks fit as a condition of giving leave to defend; and in this case he has imposed as a term that the defendant shall give security to the satisfaction of the master. The order makes the master the judge of the sufficiency of the security tendered. The master really acts in such cases as a person designated by the order to determine as to the sufficiency of the security. There is really no reason in point of law why the judge might not appoint any referee to determine that question under Order XIV., r. 6. Such orders have been repeatedly made ever since

(1) (1867) L. R. 3 Q. B. 54.

(2) (1877) 3 Q. B. D. 1.

Order XIV., came into force, and till now no one has ever heard of such an appeal as this. If the defendant's contention is right, there may be a series of appeals, from the master to the judge, and from the judge to the Court of Appeal, and possibly from the Court of Appeal to the House of Lords, in each of which the question of the sufficiency of the security must be investigated de novo. If a defendant could appeal against a decision of the master that the security tendered was insufficient, it would follow that a plaintiff also could maintain a succession of appeals against a decision by the master that it was sufficient.

Witt, K.C., in reply.

MATHEW L.J. In my opinion the contention of the defendant fails, and this appeal must be dismissed. The case appears to me to depend upon the terms of Order XIV., r. 6. That rule provides that "leave to defend may be given unconditionally or subject to such terms as to giving security, or time and mode of trial (in cases which, under these rules, may be tried without a jury), or otherwise, as the judge may think fit." I think the effect of that provision is to give power to the judge to impose as a term that security shall be given, and to designate a person to ascertain whether the security tendered is sufficient. That was what was done by the order made in the present case. In such a case I think the master acts as a person designated by virtue of the power given to the judge of imposing any terms on giving leave to defend. Here an order was made at chambers that the defendant should have leave to defend on giving security to the satisfaction of the master. That order was affirmed by the judge, and there was no appeal against his order. The parties went back to the master, and the question as to the sufficiency of the security was gone into by him, and he decided that the security tendered was insufficient. The defendant seeks to appeal against that decision. The order made in this case is in a form which has long been common in such cases; but this appears to be the first time that it has ever been contended that, under such an order, the master's decision with regard

C. A. 1903

HOARE & Co. v. MORSHEAD.

to the sufficiency of the security tendered may be reviewed, and that there may be a succession of appeals in which the sufficiency of the security may be again and again investigated. I do not think that any appeal lies from the decision of the master in such a case.

COZENS-HARDY L.J. I agree; and I only wish to add a word or two as to the argument which has been based upon Order LIV., r. 21. It is said that in the present case there was a "decision" of a master, and therefore there must be a right of appeal. That argument really begs the question, for it assumes that, in deciding whether the security was sufficient, the master was acting in the exercise of his jurisdiction as master, and not as persona designata. For the reasons given by Mathew L.J., it appears to me that, having regard to the terms of Order XIV., r. 6, and the order made at chambers in this case, it is impossible to allow the defendant to question the determination of the master that the security tendered was insufficient.

Appeal dismissed.

Solicitors for plaintiffs: *Tylee & Co.*
Solicitor for defendant: *B. Walker Kemp.*

E. L.

CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

1903
Feb. 23, 24;
April 1, 22.

Insurance (Marine)—Voyage Policy—Construction—Termination of Risk—Insurance for Period after Arrival of Ship—"Days," how to be Reckoned.

In a policy of insurance on a ship the risk was described as being for a voyage to a named port "and for 30 days in port after arrival however employed," and as running until the ship "hath moored at anchor as above in good safety." The ship arrived in port and was moored at anchor in good safety at 11.30 A.M. on August 2, 1902. She remained in port until September 1, 1902, and was totally lost through perils insured against at 4.30 P.M. on that day:—

Held, that the expression "30 days" in the policy meant thirty consecutive periods of twenty-four hours each, the first period of which began to run at 11.30 A.M. on August 2, and, therefore, that the policy had ceased to cover the risk when the loss occurred.

COMMERCIAL CAUSE, tried before Bigham J. with a special jury.

The action was brought upon a policy of marine insurance, dated April 24, 1902, and the plaintiff claimed to recover from the defendants, who were underwriters of the policy, for a total loss of his ship, the *Inchcape Rock*.

The risk was described in the body of the policy in the following words: "For a voyage from Portland Oregon by any route to Algoa Bay and for 30 days in port after arrival however employed." The print of the policy was in the ordinary Lloyd's form, and described the risk as running until the vessel "hath moored at anchor 24 hours in good safety"; but the printed words "24 hours" were struck through with a pen and the words "as above" were written over them.

The ship came into Algoa Bay on August 2, 1902, and anchored. She remained there until September 1, 1902, when she was driven on shore by a heavy gale of wind and totally lost. The jury, in answer to questions left to them by the learned judge, found, first, that the ship arrived in Algoa Bay at 10 A.M. on August 2, 1902; secondly, that she was safely moored at anchor in the bay at 11.30 A.M. on that

1903

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION.

day; and, thirdly, that she was totally lost at 4.30 P.M. on September 1, 1902.

J. A. Hamilton, K.C., and *Leck*, for the plaintiffs, contended that the ship was covered by the policy until the end of the thirtieth day after the arrival of the ship at Algoa Bay, because the days intended by the policy were calendar days running from midnight to midnight, and the first of the thirty days did not begin to run until midnight after the ship's arrival at Algoa Bay; so that the thirty days did not expire until September 1 at midnight. They further contended that, even if the thirty days were to be reckoned as periods of twenty-four hours from the ship's arrival, the risk was still covered by the policy, because the evidence shewed that the ship was not in a position to discharge her cargo until 5 P.M. on August 2, and the thirty days did not begin to run until she was in a position to discharge her cargo.

[They cited *The Katy* (1), *In re Railway Sleepers Supply Co.* (2), and *Stone* v. *Marine Insurance Company, Ocean, Limited, of Gothenburg.* (3)]

Scrutton, K.C., and *Loehnis*, for the defendants, contended that, on the true construction of the policy, the thirty days meant thirty consecutive periods of twenty-four hours commencing when the ship was safely moored at anchor—namely, at 11.30 A.M. on August 2, and, therefore, that the policy ceased to attach at 11.30 A.M. on September 1.

[They cited *Mercantile Marine Insurance Co.* v. *Tithering-ton* (4) and *Migotti* v. *Colvill.* (5)]

Cur. adv. vult.

April 22. The following judgment was read by

BIGHAM J. In this case the defendants had underwritten the plaintiff's ship, *Inchcape Rock*. The risk is described in the body of the policy in writing in the following words: "For a voyage from Portland Oregon by any route to Algoa Bay and for 30 days in port after arrival however employed."

(1) [1895] P. 56.
(2) (1885) 29 Ch. D. 204.
(3) (1876) 1 Ex. D. 81.
(4) (1864) 5 B. & S. 765; 34 L. J. (Q.B.) 11.
(5) (1879) 4 C. P. D. 233.

1903

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION.

Bigham J.

The question I have to determine is whether at the time of the loss the thirty days here mentioned had run out; and the answer to the question depends upon the meaning to be attached to the word "days"—whether it is to be taken to mean thirty consecutive periods of twenty-four hours or thirty calendar days. The print of the policy is in the ordinary Lloyd's form, which describes the risk as running until the vessel "hath moored at anchor 24 hours in good safety"; but the printed words "24 hours" are struck through with a pen and the words "as above" are written over them, the effect being to incorporate at this point the earlier written words which I have just read. Thus, the duration of the risk may be described as extending until thirty days after the vessel's arrival and safe mooring at anchor in the bay. The case was tried before me with a jury, and they found the following facts: First, that the vessel arrived in Algoa Bay at 10 A.M. on August 2, 1902; secondly, that she was safely moored at anchor in the bay at 11.30 A.M. on the same day; and, thirdly, that she was totally lost at 4.30 P.M. on September 1. Thus it will be seen that, if the thirty days are to be calculated as periods of twenty-four hours beginning at 11.30 A.M. on August 2, the risk had run off at the time of the loss; otherwise, if the thirty days are to be taken as meaning thirty clear calendar days. I do not suppose there could be any doubt about the duration of the risk if the policy had been issued in its original printed form, unaltered, and without the written words which I have read. The risk would have lasted until 11.30 A.M. on August 2, and from that moment until 11.30 A.M. on August 3. It could not have been contended that the first of the twenty-four hours did not begin to run until noon on August 2, for the period of time from 11.30 to 12.30 is as much an hour as the period of time from noon to 1 P.M. Why should the expression "30 days" be read in a different way? No doubt in some cases the word "day" means a period of twenty-four hours, starting from midnight and ending at midnight. That is a calendar day—a Monday or a Tuesday. But did the parties to this contract use the word in that sense? I think clearly not. The risk was to be a continuing risk. It

1903

CORNFOOT v. ROYAL EXCHANGE ASSURANCE CORPORATION.

Bigham J.

was not to stop at 11.30 on the morning of August 2 and then to revive at midnight. It was to run continuously from 11.30 A.M. on August 2 until the expiration of the thirty days, and no longer. To interpret the contract in the way contended for by the plaintiff would have the effect either of imposing on the defendants a longer risk than they bargained to undertake, or of relieving them from liability during the hours from 11.30 A.M. on August 2 until midnight. Neither party intended to make such a contract. It follows, therefore, that the thirty days mentioned in the policy must be taken to mean thirty consecutive periods of twenty-four hours beginning at the time of the ship's safe mooring in the bay. After the jury had been discharged another point was taken on behalf of the plaintiff. It was said that the ship was not ready to discharge until 5 P.M. on August 2, and that as, upon the authorities, a ship cannot be said to be safely moored unless and until she is ready to discharge, the time did not begin to run until 5 P.M. I am, however, quite satisfied, notwithstanding some of the vivâ voce evidence, that the ship was an arrived ship within the meaning of the policy by 11.30 A.M., and was then ready to discharge; and this was what the jury meant to find, and did find, in answer to my questions.

There must be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

W. A.

EDWARD NELSON & CO., LIMITED, AND OTHERS *v.* FABER & CO.

1903
May 29;
June 16, 17,
29.

Company—Debentures—Floating Security—Set-off—Second Debenture-holders, Rights of—Liberty of Company to Carry on Business.

A debenture issued by a trading company to their bankers and payable on August 1, 1900, provided that the debenture should be a first charge upon all the company's undertaking and property present and future; that such charge was to be a floating security, but so that the company were not to be at liberty to create any mortgage or charge in priority to, or upon an equality with, that debenture; that the company should be at liberty to carry on their business until default should be made in payment of the principal sum secured, or until a receiver should be appointed, and that from and after such default, or the appointment of a receiver, the liberty of the company to carry on their business should forthwith cease and determine, and the charge created by the debenture should be immediately enforceable. The company subsequently issued to the defendants, with whom they had been and were trading, a debenture payable on October 1, 1900, and expressed to be subject to the debenture held by the bankers. The company made default in payment both of the debenture issued to the bankers and of that issued to the defendants. The bankers took no steps to stop the company carrying on their business until October 2, 1901, when they appointed a receiver. In an action brought by the company and the bankers to recover from the defendants the balance of the price of goods sold and delivered by the company to the defendants between July 1, 1900, and October 1, 1901:—

Held, that the defendants were entitled to set off the sum which, on October 1, 1900, became due under their debenture against the sum due to the plaintiffs for the goods.

ACTION tried before Joyce J. sitting as an additional judge of the King's Bench Division.

The plaintiffs, Edward Nelson & Co., Limited, were lace manufacturers at Nottingham, and the defendants were a firm of lace merchants carrying on business in Austria.

The claim in the action was for 2887*l.*, the balance alleged to be due for the price of lace goods sold and delivered by Edward Nelson & Co., Limited, to the defendants.

The defendants admitted the sale and delivery of goods to the amount claimed, but alleged (inter alia) that they were

1903

EDWARD NELSON & Co., LIMITED v. FABER & Co.

entitled to set off against the claim sums of a greater amount due to them under debentures issued to them by Edward Nelson & Co., Limited, and counter-claimed for the balance.

The facts proved or admitted at the trial, so far as they are material for the purposes of this report, were as follows:—

On March 12, 1900, the plaintiffs, Edward Nelson & Co., Limited, duly issued and delivered to the plaintiffs, Moore & Robinson's Bank, three debentures bearing that date.

By No. 1 of those debentures Edward Nelson & Co., Limited, covenanted to pay the bank, on August 1, 1900, the sum of 3000*l.*, with interest thereon, and the company thereby charged with such payments its undertaking and all its property whatsoever and wheresoever both present and future, and the debenture was expressed to be issued subject to the conditions indorsed thereon.

By No. 2 the company covenanted, in the same form and subject to the same conditions, to pay the bank 2000*l.*, with interest thereon, on August 1, 1901.

The conditions indorsed on each of the debentures numbered 1 and 2 provided as follows:—

Condition 1. "This debenture is one of a series of debentures of the company for securing principal sums not exceeding in the whole 15,000*l.* The debentures of the said series are all to rank pari passu as a first charge on the property hereby charged without any preference or priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to or upon an equality with the said debentures."

Condition 2. "Notwithstanding the charge created by the said debentures, the company shall be at liberty in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property until" (amongst other events not material to be stated for the purposes of this report) "default shall be made in payment of any principal moneys hereby secured, or for the period of two calendar months after the same shall have become due according to the

tenor of this debenture of any interest thereon, or until a receiver of the company's undertaking or any part thereof shall be appointed," &c.

Condition 3. "From and after such default . . . . or the appointment of such receiver . . . . whichever shall first happen . . . . the liberty and authority to the company hereinbefore given shall forthwith cease and determine, and the principal moneys hereby secured shall immediately become payable, and the charge by this debenture created shall and may be immediately enforceable."

Condition 11 provided that at any time after the principal moneys thereby secured should become payable, or in the event of the company making default for two calendar months in the payment of any interest thereby secured, the registered holder of the debenture might appoint by writing a receiver of the undertaking and property charged by the said debenture, and a receiver so appointed should have power to take possession of the property charged by the said debenture and to carry on, or concur in carrying on, the business of the company, and to sell, or concur in selling, the company's undertaking and property, and that moneys received by the receiver should be applied in or towards satisfaction of the debenture.

On May 14, 1900, Edward Nelson & Co., Limited, duly issued and delivered three debentures to the defendants.

By No. 1 of those debentures the company covenanted to pay to the defendants the sum of 1500*l.* on October 1, 1900; by No. 2 the sum of 1500*l.* on October 1, 1901; and by No. 3 the sum of 3000*l.* on October 1, 1901; and each of those debentures contained, in the conditions indorsed thereon, the following stipulations: "This debenture is one of a series of debentures of the company for securing principal sums not exceeding in the whole 6000*l.* The debentures of the said series are all to rank pari passu (subject as hereinafter mentioned) as a charge upon the property hereby charged without any preference or priority one over another, and such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to or upon an equality with the said debentures, subject, however, to

1903

EDWARD NELSON & Co., LIMITED v. FABER & Co.

an existing issue of prior debentures for the total amount of 15,000*l.*" The existing issue of prior debentures there referred to were the debentures issued to Moore & Robinson's Bank as before stated.

Edward Nelson & Co., Limited, did not, on August 1, 1900, or at any time, pay to Moore & Robinson's Bank the sum of 3000*l.* payable under the covenant contained in the first of the debentures issued to that bank. The bank, however, did not appoint a receiver, and took no step at that time to prevent the company from carrying on their business, which they continued to do. The company did not, on October 1, 1900, or at any time, pay to the defendants the sum of 1500*l.* payable under the covenant contained in debenture No. 1 of the debentures issued to them.

The company did not, on August 1, 1901, or at any time, pay to the bank the sum of 2000*l.* payable under the covenant contained in debenture No. 2 of the debentures issued to them; nor did the company, on October 1, 1901, pay to the defendants the sum of 1500*l.* payable under the covenant contained in debenture No. 2.

On October 2, 1901, the bank appointed a receiver under the power contained in their debentures, and on the same date he took possession of the property and undertaking of the company and carried on their business.

The manager of the bank gave evidence that on September 28, 1901, he saw the managing director of the company, and told him that unless payment was provided for of certain cheques drawn by the company in favour of customers and presented to the bank for payment, the bank would at once take steps to appoint a receiver; that payment of those cheques was not provided for; that on September 30, 1901, the bank manager again saw the managing director of the company and asked him if he would consent to act as receiver for the bank as debenture-holders; that on the same day the bank manager gave directions to the bank's solicitors to proceed with the preparation of a deed appointing a receiver; and that on October 2 the managing director of the company definitely consented to act as receiver, and was appointed accordingly.

The goods claimed for in the action were supplied between July 1, 1900, and October 1, 1901. The action was originally brought in the name of the plaintiffs, Edward Nelson & Co., Limited, for and on behalf of Moore & Robinson's Bank; but that bank, and another bank with whom they had amalgamated, were subsequently added as plaintiffs. The defendants claimed (inter alia) to set off against the plaintiffs' claim the two sums of 1500*l.* and 1500*l.* payable under the debentures held by the defendants, and counter-claimed to be paid the balance by Edward Nelson & Co., Limited.

Montague Lush, K.C., *O. Leigh Clare*, and *Appleton*, for the plaintiffs. The defendants are not entitled to set off any sums due to them under their debentures against the sum claimed by the banks. By the express terms of the conditions indorsed on the first of the debentures issued by E. Nelson & Co., Limited, to Moore & Robinson's Bank, the liberty and authority of the company to carry on its business absolutely ceased and determined on August 1, 1900, when default was made by the company in payment of that debenture. The security ceased to be a floating security on that date; and, in the absence of any conduct by the banks which would raise an estoppel against them, no right of set-off could thereafter be acquired by the defendants, who had notice of the debentures issued to Moore & Robinson's Bank, and took their own debentures subject thereto. In construing a condition indorsed upon the debentures in *Government Stock and Other Securities Investment Co., Ld.* v. *Manila Ry. Co.* (1), Lord Halsbury L.C. was of opinion that the company's liberty to carry on business after default continued because, though the condition provided that they might carry on business until default, the words "and no longer" could not be implied from it. The equivalent of those words is clearly expressed in the condition in the present case. Until August 1, 1900, E. Nelson & Co., Limited, carried on their business as of right; after that date they carried it on by the sufferance of the banks and at their mercy: see Lord

(1) [1897] A. C. 81.

1903

EDWARD NELSON & CO., LIMITED v. FABER & CO.

Macnaghten's judgment in *Government Stock and Other Securities Investment Co., Ld.* v. *Manila Ry. Co.* (1) After default the banks had a lien upon all the goods of the company and an equitable charge upon the price of all goods sold by the company, who became trustees for the banks of those goods and that money. The right of the company to sue the defendants, on October 2, 1900, for the price of goods sold and delivered was subject to the equitable charge of the banks. There could be no right of set-off under these circumstances. The result of the cases is that, in order to establish a set-off, there must be two debts presently due; they must be liquidated debts, and they must be owing between the respective parties in their own rights: see *Ex parte Cleland, In re Davies* (2); *Fair* v. *M'Iver.* (3) The right of set-off is statutory, and does not arise where, as here, one of the debts is clogged with an equitable charge in favour of third persons. The claim of the defendants is for the statutory right only; they claim no right of set-off by express contract or hypothecation.

Next, the defendants are not, at any rate, entitled to set off the sum payable under their debenture which fell due on October 1, 1901, because the evidence establishes that the banks had, on September 30, 1901, given the company express notice determining their liberty to carry on their business. Any distinct intimation that the banks intended to enforce their rights is sufficient: *Doe* v. *Price.* (4)

Further, the defendants, being second debenture-holders who took their debentures with notice of the first series of debentures issued to the banks and subject thereto, cannot assert or exercise any right under their debentures in derogation of the rights of the first debenture-holders; and by claiming this set-off they are asserting and attempting to enforce such a right.

Spencer Bower, K.C., and *Henriquez*, for the defendants. In order to prevent the defendants' right of set-off, the plaintiffs must establish that there was, before October 1, 1901, an

(1) [1897] A. C. 81, at pp. 86, 87.
(2) (1867) L. R. 2 Ch. 808.
(3) (1812) 16 East, 130; 38 R. R. 438, 442.
(4) (1832) 9 Bing. 356; 35 R. R. 553.

assignment by the company to them of the debt due from the defendants to the company, and that the defendants had notice of that assignment. The debentures issued to Moore & Robinson's Bank constituted, at most, an incomplete assignment. The conditions indorsed on those debentures did not provide that there should be an assignment if default was made in payment of the bank's first debenture, and nothing short of the appointment of a receiver could operate as an assignment. There is nothing in those conditions to prevent the ordinary rule, as laid down by various decisions, from applying. The case is governed by the decisions in *Biggerstaff* v. *Rowatt's Wharf, Limited* (1) and *Government Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (2): see also *Robson* v. *Smith* (3); *In re Roundwood Colliery Co., Ld., Lee* v. *Roundwood Colliery Co., Ld.* (4), judgment of Lindley L.J.; *In re Hubbard & Co., Ld., Hubbard* v. *Hubbard & Co., Ld.* (5) No notice of assignment is alleged to have been, or has in fact been, given by the banks to the defendants. Notice of the appointment of a receiver must have been given to the defendants before their transactions with the company could be interfered with: *Re Arauco Co., Ld.* (6) If the debentures issued to the banks constituted an assignment to them, they took subject to the equities of the assignors, and the evidence shews that the company when formed agreed with E. Nelson, from whom they took over the business, to take over his debt to the defendants. Moore & Robinson's Bank had notice of that agreement when they took their debentures from the company, and the debentures subsequently issued by the company to the defendants were to secure payment of E. Nelson's debt to them. As to the right of set-off, the rule is that "where there are cross-debts accruing but not yet due, there is, independently of the legal rights of the parties, a distinct absolute equitable right that the balance only should be considered due": *Watson* v. *Mid-Wales Ry. Co.* (7), judgment of Willes J.; see

(1) [1896] 2 Ch. 93.
(2) [1897] A. C. 81.
(3) [1895] 2 Ch. 118.
(4) [1897] 1 Ch. 373, at p. 393.
(5) (1898) 68 L. J. (Ch.) 54.
(6) (1898) 79 L. T. 336.
(7) (1867) L. R. 2 C. P. 593, at p. 599.

1903

EDWARD NELSON & Co., LIMITED v. FABER & Co.

also *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1), judgment of the Privy Council. The banks have, by lying by and allowing the company to carry on its business, so conducted themselves as to render it inequitable that they should be allowed to resist the set-off claimed.

The evidence on which the banks rely does not establish an express notice to the company on September 30, 1901, to cease carrying on their business.

By claiming a set-off, the defendants are not asserting or attempting to enforce any right in derogation of the rights of the first debenture-holders; they are not seeking to enforce their charge in priority to the charge created by the first debentures.

[They also referred to *Mercer* v. *Graves.* (2)]

O. Leigh Clare, in reply. The cases cited for the defendants depend upon their own facts, and are all distinguishable from the present. In *Biggerstaff* v. *Rowatt's Wharf, Limited* (3), and in the other cases, the continuance of the charge as a floating charge was not expressly limited as it is here. The banks, by allowing the company to continue carrying on its business, have not altered the position of the defendants in any way, and have, therefore, raised no equity against themselves; nor has the company made any contract with the defendants which could raise any equity in favour of the latter.

Cur. adv. vult.

June 29. JOYCE J. The defendants, Faber & Co., had dealings with E. Nelson & Co., Limited. On October 1, 1901, they owed the last-mentioned firm a sum of more than 2000*l.* for goods supplied; but Faber & Co. held two debentures of E. Nelson & Co., Limited, each for 1500*l.* One of these debentures had become due on October 1, 1900, and the other became due on October 1, 1901. Primâ facie, therefore, Faber & Co. are entitled to set off the amount of these debentures against their debt to E. Nelson & Co., Limited, and to pay-

(1) (1888) 13 App. Cas. 199, at pp. 210, 211.

(2) (1872) L. R. 7 Q. B. 499.

(3) [1896] 2 Ch. 93.

ment by E. Nelson & Co., Limited, of the balance of the aggregate amount (3000*l.*) of the two debentures. But the plaintiff banks held debentures of E. Nelson & Co., Limited, prior in date to those held by Faber & Co. They held two debentures, each of them issued in March, 1900, one for 3000*l.*, which fell due on August 1, 1900, and the other for 2000*l.*, which fell due on August 1, 1901. Those debentures charge the undertaking of the company and all its property, and by the conditions indorsed on them it is provided that the charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to, or upon equality with, those debentures. Then, clause 2 of the conditions gives liberty to the company to carry on its business until default, and clause 3 provides that from and after default the debenture is to become enforceable. Under those debentures held by the plaintiff banks a receiver was appointed on October 2, 1901, who probably took possession thereupon or shortly afterwards, though I am not sure that express notice of his appointment was given to anybody except E. Nelson & Co., Limited. The banks contend that when default was made in payment of the debenture which fell due on August 1, 1900, the right of E. Nelson & Co., Limited, to carry on business determined, and that those debentures, or, at all events, the earlier one of them, ceased to be a floating charge, although there was no active intervention by the banks before the appointment of the receiver, and no formal or express notice was ever given by either of the banks to Faber & Co. before the institution of the present action or the dispute which gave rise to it; though Faber & Co. were no doubt aware of the existence of the earlier debentures in the hands of the banks.

It is a general rule with respect to a chose in action that an assignee takes it subject to all the equities—in other words, whatever defence by way of set-off or otherwise the debtor would be entitled to set up against the assignor's claim up to the time of his receiving notice of the assignment he may also raise and maintain against the assignee. The nature and effect of the floating charge or security created by debentures is, in my opinion, perfectly well settled by the decided cases. See

1903

EDWARD NELSON & Co., LIMITED v. FABER & Co.

Joyce J.

in particular Lord Macnaghten's judgment in *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (1), where he says: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement." Again, he says: "During the period of grace, or until there is a winding-up, the company are to be free to carry on their business: they are to carry it on as of right. When that period comes to an end, the charge will have its ordinary effect. Thenceforward so long as the default lasts the business will be carried on, not as of right, but by the sufferance of the debenture-holders and at their mercy." Lord Macnaghten had previously said in *Tailby* v. *Official Receiver* (2), speaking of a certain security: "It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes." And Lord Lindley, in the important case of *Biggerstaff* v. *Rowatt's Wharf, Limited* (3), says that it is a settled principle that, where there is a floating security, "the company can, until the debenture-holders interfere, carry on its business as if the debentures did not exist."

It follows, I think, from these and other cases that such a debenture as this in the present case does not cease to be a floating security, or, to use another expression, does not become an active security, until the company has been wound up, or stops business, or a receiver has been appointed at the instance of the debenture-holders, and it follows that, even after the

(1) [1897] A. C. 81, at pp. 86, 87.

(2) (1888) 13 App. Cas. 523, at p. 541.

(3) [1896] 2 Ch. 93.

interest payable on such debentures has been in arrear for the time specified, the company can deal with the property in the ordinary course of business until the company has been wound up, or stops business, or a receiver has been appointed. In the present case there was no intervention by the debenture-holders until October 2, 1901. I decline to attach any importance to the previous conversations between the manager of the bank and the managing director of the company; for, in the first place, they clearly do not amount to a determination of the debenture-holders' licence to carry on the business; and, in the next place, mere private conversation of that character could not, I think, without express notice to the customers of the company, affect them. In my opinion, there is nothing special in the form or terms of the debentures held by the bank, or in the circumstances of this case, to exclude the application of the general doctrine settled in the cases to which I have referred. The result, therefore, in my opinion, is that the defendants are entitled to set off the debentures due to them on or before October 1, 1901, against the debt in respect of goods purchased, and that they are entitled to do this as well against the plaintiff banks as against Edward Nelson & Co., Limited.

In my view, it is immaterial that the debentures held by the defendants are expressed to be subsequent to the existing issue of prior debentures. This only had reference to the order of priority of the debentures considered as charges, and does not preclude the defendants from obtaining payment of their debentures in cash or by setting off the amount. Under the circumstances, it is unnecessary for me to consider the other contentions raised on behalf of the defendants—I mean in reference to the effect of any prior arrangement between the defendants and the predecessors of the company incorporated under the name of E. Nelson & Co., Limited. It must be declared that the defendants are entitled to set off as against the amount due from them for goods the amount due to them on the debentures, and to have judgment against E. Nelson & Co., Limited, for the balance of the 3000*l.* after deducting that

1903

EDWARD NELSON & Co., LIMITED v. FABER & Co.

amount, this order being without prejudice to any claim or any question in respect of the subsequent debenture of 3000*l.* which became due also on October 1, 1901.

Judgment for the defendants accordingly.

Solicitors for plaintiffs: *Grover, Humphreys & Son, for Freeth, Rawson & Cartwright, Nottingham.*

Solicitors for defendants: *Monkland & Co., for Maples & McCraith, Nottingham.*

W. A.

C. A.

1903

July 1, 2.

[IN THE COURT OF APPEAL.]

RATHBONE BROTHERS & CO. *v.* D. MACIVER, SONS & CO.

Ship—Bill of Lading—Construction—Liability of Shipowner—Exceptions—"Unseaworthiness"—Unfitness of Ship to carry Cargo.

A bill of lading of sheepskins exempted the shipowners from liability (inter alia) "for loss or damage resulting from the consequence of any injury to or defect in hull, tackle, or machinery .... however such defect or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel .... and whether .... the loss or injury arising therefrom be occasioned by the .... negligence of the .... owners, masters, officers .... crew, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Some of the sheepskins were damaged by fresh water which escaped from a pipe which was broken at the time when the cargo was loaded.

In an action by the indorsees of the bill of lading against the shipowners for the damage to the sheepskins, the defendants admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against that unfitness, but the defendants claimed exemption from liability under the terms of the bill of lading:—

Held, by the Court of Appeal, that the clause relating to unseaworthiness did not create an additional exception, but was a qualification of the prior exceptions; that it included unfitness of the ship to receive the cargo;

and that, as the shipowners had not taken reasonable means to provide against that unfitness, they were liable for the loss.

Decision of Wills J. reversed.

Primâ facie the term "unseaworthiness" in a bill of lading includes unfitness of the ship to carry the cargo as well as unfitness to encounter the perils of navigation.

APPEAL by the plaintiffs from the judgment of Wills J. at the Liverpool Assizes. (1)

The plaintiffs were the indorsees of four bills of lading, signed by the defendants' agents, in respect of bales of sheepskins shipped at Buenos Ayres for Liverpool on board the steamship *Barbary*, of which the defendants were the owners. The sheepskins were damaged by fresh water which escaped from a broken pipe leading from a tank for domestic service. The pipe was already broken when the cargo was loaded on the ship at the commencement of the voyage. The plaintiffs claimed damages for the injury to the sheepskins.

The bills of lading provided that the goods, shipped at Buenos Ayres in apparent good order and condition, were to be delivered in like good order and condition at Liverpool "(the act of God . . . . and loss or damage resulting from (inter alia) the consequence of any damage, breakdown, injury to, or defect in hull, tackle, boilers, or machinery, ... however such damage, defect, or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel, collision, stranding . . . . or any other peril of the sea . . . . and whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the . . . . negligence . . . . of the owners, master, officers . . . . crew . . . . and whether before or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness, or by any cause whatever excepted)."

It was admitted by the defendants (1.) that the vessel was

(1) (1902) 8 Com. Cas. 1.

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

not fit to receive cargo at the time when the sheepskins were loaded, and (2.) that reasonable means had not been taken to provide against that unfitness.

The learned judge held that the shipowners were not liable, on the ground that the latter part of the exception as to "unseaworthiness" extended only to unseaworthiness of the ship as a ship—i.e., to her unfitness to meet the perils of navigation with safety to the ship, and not to her unfitness to carry the cargo. The plaintiffs appealed.

Pickford, K.C., and *Leslie Scott*, for the plaintiffs. The question is what is the meaning of the term "unseaworthiness" in this bill of lading. The term "seaworthiness" is used sometimes in the narrow sense of fitness to encounter the ordinary perils of the sea, and sometimes in a wider sense as including also the fitness of the ship to carry the cargo which it is intended to carry. This is no doubt a modern extension, but in recent times the Courts have recognised that the word is commonly used to include fitness to carry the cargo, and, in the absence of any context to restrict the meaning, it must be taken to be used in its ordinary commercial sense: *Owners of Cargo on Maori King* v. *Hughes* (1); *Rowson* v. *Atlantic Telegraph Co.* (2); *Morris* v. *Oceanic Steam Navigation Co.* (3); Carver's Carriage by Sea, s. 17; Scrutton on Charterparties and Bills of Lading, p. 69.

[VAUGHAN WILLIAMS L.J. referred to *Stanton* v. *Richardson*. (4)]

In bills of lading founded upon the (American) Harter Act the word has its wider meaning. Wills J. relied upon the words which follow the term "unseaworthiness" in this bill of lading, namely, "at the beginning or at any period of the voyage," as shewing that the term was used in its strict narrow sense, because, if it were used with reference to fitness to carry the cargo, the words would have been "at the time of loading," that being the critical time; but this reasoning

(1) [1895] 2 Q. B. 550.
(2) (1902) 8 Com. Cas. 74.
(3) (1900) 16 Times L. R. 533.
(4) (1872) L. R. 7 C. P. 421; (1874) L. R. 9 C. P. 390.

cannot be supported, because it has been held that the term "voyage" in an instrument of this kind includes the time for loading: *The Carron Park.* (1) The two concluding clauses of the bill of lading are not additional exceptions, but are explanations of the foregoing exceptions. The reason for inserting them was that, apart from these two clauses, the specific exceptions would not exonerate the shipowner from loss or damage arising from neglect or unseaworthiness. The effect of these two clauses is that, in the case of an exception which does not depend upon the question of unseaworthiness, the shipowner is excused altogether, whether negligent or not; but, as regards unseaworthiness, he is excused only if he has taken reasonable care to prevent it. Wills J. has construed these clauses as if they were additional exceptions. If there is any ambiguity as to the meaning of "unseaworthiness" in this clause (which is not admitted), the ordinary common law liability of the shipowner remains unaffected, and the risk must fall on him.

Horridge, K.C., and *Maurice Hill*, for the defendants. Apart from the concluding proviso as to unseaworthiness, the shipowners would not be liable under this bill of lading. This bill of lading extends the exemptions so as to prevent the shipowners from being liable for any defect, even before the loading of the vessel. The exemptions cover cases within the warranty of seaworthiness, and the concluding words are intended to sweep in any other cases of unseaworthiness, provided that reasonable care is used. These exemptions get rid of the obligation to provide a ship fit for the reception of the cargo: *Cargo ex Laertes* (2); *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.* (3) In *Tattersall* v. *National Steamship Co., Ld.* (4), it was held that the exemptions in the bill of lading did not apply to the defect of not providing a ship fit for the cargo; but the ground of decision was that in that case there was nothing in the contract referring to a period anterior to the commencement of the voyage. In

(1) (1890) 15 P. D. 203.
(2) (1887) 12 P. D. 187.
(3) [1898] 1 Q. B. 645; [1899] 1 Q. B. 56.
(4) (1884) 12 Q. B. D. 297.

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Carver's Carriage by Sea, s. 21, a distinction is drawn between the warranty of seaworthiness and the warranty of fitness of the ship for special goods, and it is pointed out that the warranty of seaworthiness proper begins at the commencement of the voyage. If the plaintiffs' contention is admitted, namely, that unseaworthiness in this bill of lading includes unfitness to carry the cargo, the effect will be to wipe out the whole of the specific exemptions.

By the use of apt words the shipowner's liability for the unseaworthiness of the ship may be limited or even abrogated: *Cargo ex Laertes.* (1) In that case the wording of one of the bills of lading (the third) was in substance the same as that of the bills of lading in the present case, and it was held that the shipowner was relieved from liability for unseaworthiness existing at the beginning of the voyage. In the present case there is an express provision that the shipowners are not to be liable for any defects existing at or before the loading or sailing of the ship, and thus the case is distinguished from *Owners of Cargo on Maori King* v. *Hughes.* (2) Negligence is also excepted. *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.* (3) illustrates the principle applicable. The words "or by unseaworthiness," &c., constitute an additional exception, and not a limitation of the previous exceptions. The shipowners are entitled to avail themselves of whichever exception is most in their favour: *Borthwick* v. *Elderslie Steamship Co.* (4) "Unseaworthiness" should be understood in its strict sense, namely, unfitness to encounter the perils of the sea, and not as including unfitness to receive the cargo. *Gilroy, Sons & Co.* v. *Price & Co.* (5) and *Morris* v. *Oceanic Steam Navigation Co.* (6) dealt with the question of unseaworthiness. In *Owners of Cargo on Maori King* v. *Hughes* (2) the question was as to unfitness to receive the cargo; and that was also the question in *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (7) The distinction is shewn by *Rowson* v. *Atlantic Telegraph Co.* (8) A warranty of "seaworthiness"

(1) 12 P. D. 187.
(2) [1895] 2 Q. B. 550.
(3) [1898] 1 Q. B. 645; [1899] 1 Q. B. 56.
(4) (1903) 19 Times L. R. 313.
(5) [1893] A. C. 56.
(6) 16 Times L. R. 533.
(7) [1898] 1 Q. B. 567.
(8) 8 Com. Cas. 74.

has no application until the receipt of the cargo; a warranty of "fitness" applies at the time when the loading commences, i.e., before the commencement of the voyage: *Stanton* v. *Richardson* (1); *Cohn* v. *Davidson*. (2) The implied warranty of "seaworthiness" ceases after the bill of lading comes into operation, and the liability is then governed by the contract. There is no rule of law that "unseaworthiness" includes "unfitness," and in this bill of lading the term is used in its strict sense, i.e., unfitness to encounter the perils of the sea. If it had been intended to exclude "unfitness" the words "before, or after, or during the voyage" would have been inserted as in the previous part of the document. If "unfitness" is included, the prior provisions are in effect set aside. A broken service pipe cannot properly be described as "unseaworthiness." It is submitted that the construction adopted by the learned judge gives a consistent meaning to the whole of the bill of lading. On the other construction the shipowners would be liable for every injury arising from negligence.

[They also referred to *Steel* v. *State Line Steamship Co.* (3)]

Pickford, K.C., in reply. If the effect of the latter clause is to put an end to all the prior exceptions, that is the fault of the shipowners for so expressing the bill of lading. In order to relieve a shipowner of his common law liability very clear words must be used. At the best this bill of lading is ambiguous, and the onus is on the shipowner to shew that he is exempted from liability.

VAUGHAN WILLIAMS L.J. In my opinion this judgment of Wills J. cannot be supported. I am not sure that it is necessary to differ from him on any point which he really decided, but I may say at once that I should be prepared, if necessary, to take a wider view of the meaning of the word "unseaworthiness" in this bill of lading than was taken by the learned judge.

Before I go into the case in detail I wish to point out the broad principle which I think ought to be applied in the

(1) L. R. 7 C. P. 421, 431, 436; L. R. 9 C. P. 390.

(2) (1877) 2 Q. B. D. 455.

(3) (1877) 3 App. Cas. 72, 77.

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Vaughan Williams L.J.

construction of a bill of lading, or indeed of any other contract relating to carriage of goods by sea, for instance, a charter-party. The principle was laid down by Bigham J. and by the Court of Appeal in *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.* (1) to the effect that, with reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations which will always bind him, unless there are in the contract clear and express words which without ambiguity relieve him from that which I may call his common law obligations.

In that case Bigham J. said (2): "The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to avoid this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation." In my judgment that applies to all these warranties which are implied by law in the absence of words excluding them. Then in the same case in the Court of Appeal Collins L.J. said (3): "I am not sure myself that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage, whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would primâ facie rest upon them. I think that the language used in this case is far too ambiguous for that purpose."

The basis of my judgment in the present case is that which is expressed in those words of Collins L.J., and the same thing was really said by the other judges, A. L. Smith and Rigby L.JJ., but I have read it from the judgment of Collins L.J., because the principle is very conveniently expressed there. In the present case the language of the bill of lading is, I think, far too ambiguous to exclude the common

(1) [1898] 1 Q. B. 645; [1899] 1 Q. B. 56.

(2) [1898] 1 Q. B. at p. 647.

(3) [1899] 1 Q. B. at p. 58.

law warranties of the shipowner. And again, Lord Blackburn, in *Steel* v. *State Line Steamship Co.* (1), said: "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." This passage was quoted by Kay L.J. in *Owners of Cargo on Maori King* v. *Hughes* (2), and I shall have to allude to it again when I come to deal with the meaning of the word "unseaworthiness" in this bill of lading; but I refer to it now as shewing the view which Lord Blackburn took that these warranties can be got rid of only by a clear and express stipulation.

Having said this, I will now deal with the terms of this bill of lading. [The Lord Justice read the exceptions, and continued:—]

In my opinion it is plain that it was not intended by the clause relating to "unseaworthiness" to create a new exception or to add to the list of exceptions. In my judgment that clause is a qualification which overrides the exceptions before mentioned, and is not a new exception.

Wills J., as it seems to me, based his judgment entirely on the construction of the word "unseaworthiness" in this bill of lading, and I think he treated that clause as adding an additional exception. He is reported to have said (3): "But in my opinion the words which follow the expression 'unseaworthiness' in this bill of lading, viz., 'at the beginning or at any period of the voyage,' conclusively shew that the expression 'unseaworthiness,' as used, means what I may call

(1) 3 App. Cas. 72, at p. 86. (2) [1895] 2 Q. B. 550, at p. 558.
(3) 8 Com. Cas. at p. 5.

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Vaughan Williams L.J.

unseaworthiness proper, because, if it were used with regard to the cargo, and the fitness of the particular portion of the vessel to receive it, the phrase by which it is followed, instead of being 'at the beginning or at any period of the voyage,' would certainly be 'at the time of loading,' or some equivalent phrase, because the time of loading would be the critical time at which provision would be made for the obligation of seaworthiness to arise. But in the bill of lading it is not till the beginning of the voyage that the obligation arises, and it therefore seems to me that the intention was to confine the meaning of the word to unseaworthiness proper—that is to say, unseaworthiness of the ship as a ship." In my judgment it would not be right to put this narrow construction on the word "unseaworthiness," having regard to the judgment of the Court of Appeal in *Owners of Cargo on Maori King* v. *Hughes*. (1) We ought, I think, to hold that the word covers, not only the unseaworthiness of the ship in the sense that it was not fit to meet the perils of the sea, but also in the sense that the ship was not in a fit condition to carry the cargo.

But, if I am right in this view, still it does not dispose of the whole case, because the defendants' counsel raised a point which appears not to have been raised before Wills J., and I cannot find that he expressed any opinion upon it. The point is this: admitting that the shipowners cannot get rid of what I may call their common law obligation—whether the warranty of seaworthiness includes fitness of the ship to receive the cargo, or whether the warranty of seaworthiness and the warranty of the fitness of the vessel to carry the cargo are to be treated as separate warranties—without plain and unambiguous words in the bill of lading excluding that obligation, it is said that there are in this bill of lading express words of exclusion. Reliance is placed on the words "before the loading or sailing of the vessel," and the admission by the defendants that the vessel was not fit to receive the cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against that unfitness. It is said that the words "defect in hull, tackle, machinery, &c.," are wide

(1) [1895] 2 Q. B. 550.

enough to cover that defect in the pipe which existed before the loading, or at all events at the time of the loading of the vessel, and from which the loss has resulted, whether that defect amounted to "unseaworthiness" in the strict sense, or whether it amounted to unfitness of the vessel to carry the cargo. But, reading the proviso at the end of the exceptions, it would be impossible to say it was intended that the shipowners should be under no responsibility for unseaworthiness, taking it in the widest sense. On the contrary, in the plainest possible way, their exemption from their common law liability for unseaworthiness is limited to the particular case mentioned in the proviso. But it is said that "unseaworthiness" in that part of the bill of lading ought to be limited to what Wills J. calls unseaworthiness proper. For the moment I will assume (though I do not think it is so) that "unseaworthiness" ought to be thus limited. What then? The argument comes to this—that having regard to the prior words, the final clause exempts the shipowners from all liability in respect of things occurring before the loading or at the time of the loading of the vessel, and therefore from the warranty of seaworthiness generally. But, it is said, if you read the word as meaning "unseaworthiness" proper, there is nothing to prevent the exception applying to the warranty of fitness, because the warranty of fitness is not in any way asserted by the final clause with its proviso. The answer, I think, is that the argument must go the length of saying that the words of the exception exclude every defect and every loss resulting from a defect which was in existence before or at the time of the sailing, and it would follow that it excludes the warranty of seaworthiness in its widest sense. But it is clear that, having regard to the express mention of "unseaworthiness," it cannot have that effect, and this shews that the contention that the parties must be taken to have included in the exception everything which occurred before or at the time of the loading is unsound, and the result is that the common law warranty of fitness is left untouched.

In my judgment we ought to hold that the parties have said nothing to exclude the warranty of fitness if it is treated as a separate warranty. On the other hand, if the warranty of

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Vaughan Williams L.J.

fitness is treated as part of the warranty of seaworthiness, then it seems to me that upon any reasonable construction of this bill of lading that warranty, so far from being negatived, is positively affirmed, unless the shipowners can save themselves under the proviso.

For these reasons I think the warranty of fitness is untouched by anything in this bill of lading, and I have no doubt, having regard to the admissions, that the warranty of fitness at all events has been broken, and the shipowners must be held liable for the consequences.

Though I base my judgment on this ground, I am not really differing from Wills J., for this point was not argued before him, and he expressed no opinion upon it. But, if it should be necessary to fall back on the proper meaning of the word "unseaworthiness" in this bill of lading, in my judgment the wider and not the narrower meaning is the right one.

ROMER L.J. I cannot say that the question we have to decide is an easy one; but, after the best consideration I can give to it, I also am of opinion that the appeal ought to succeed.

Now a bill of lading as regards the matters we have to consider has been the subject of a large number of decisions, and the general principles on which bills of lading should be interpreted are well known, and the general construction to be given to them, in some respects of an artificial character, is well ascertained. In my opinion it is desirable not to depart from these principles in dealing with any special bill of lading, and, so far as is possible, not to allow small variations in the form of the document to affect the general construction which has hitherto been put upon it.

As I understand, shipowners have been for a long time endeavouring to limit the general liability cast upon them by law as carriers by sea by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that as a principle of construction the warranty of seaworthiness will be held not to have

been excepted unless it plainly appears that it was intended to except it. In other words, the Court will not readily infer an exception of that warranty. Moreover I think that, whatever views may have been entertained in years gone by, the warranty of seaworthiness now includes, and is well known to include, a warranty that the ship and her equipment are fit for the purpose of safely carrying to their destination the goods which the shipowner knows are to be carried on her. I think also that in a bill of lading at the present day the expression "seaworthiness" or "unseaworthiness" would be used, and would be understood as being used, with reference to this well-known extent of the warranty.

Now in the present bill of lading the special exceptions are very numerous. Sometimes very general expressions are used in it, and in other parts you find expressions minutely detailing special injuries or injuries arising in respect of special parts of the ship or its equipment. [The Lord Justice referred to the bill of lading, and continued :—]

In the first place, is it clear that the general warranty of seaworthiness is intended to be swept away, as undoubtedly it would practically be, if all the special exceptions enumerated are to be treated as being absolutely without limit? In my opinion, not only is it not clear that that was intended, but the wording shews that the numerous and wide exceptions are not intended to extend to unseaworthiness, unless all reasonable means have been taken to provide against it. To my mind the very way in which these exceptions are wound up by reference to unseaworthiness indicates that the intention was that, notwithstanding the prior exceptions, the shipowners were to be liable for unseaworthiness unless reasonable means had been taken to provide against it. I think therefore, on the construction of this bill of lading, that the list of exceptions must be taken to be subject to this—that the shipowners are to be liable as specified for unseaworthiness. Therefore, in my opinion, it follows that the general argument for the respondents—that full effect must first be given to the special exceptions, and that then the warranty of seaworthiness must be cut down accordingly, that is to say practically destroyed—fails. I agree that

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Romer L.J.

my construction of the provisions in the bill of lading with which I am dealing cuts down to a great extent the operation of the special exceptions, but it does not destroy their effect. Cases were referred to in the course of the argument by way of illustration which shew that that is so, and I have no doubt that other examples could be given if necessary. Therefore the first and the main argument on behalf of the respondents appears to me to fail.

There is, however, a further argument on their behalf to which, as I understand, Wills J. acceded. It is said that in this bill of lading the word "unseaworthiness" ought not to receive its ordinary meaning, but should be limited to unfitness of the ship as a ship to meet the ordinary perils of navigation without special regard to the cargo. On full consideration, I think it would not be right in this bill of lading to cut down in this way the meaning of the term "unseaworthiness." In the first place, it is important to bear in mind that this word "unseaworthiness" is used in a mercantile document and by mercantile men, and it ought to receive its well-known meaning, unless there are other and overwhelming considerations which compel the Court to depart from that meaning. To my mind there is nothing in this bill of lading taken as a whole which prevents the Court from giving to the word "unseaworthiness" its ordinary meaning. The exceptions cover defects in the hull itself before, during, or after the voyage, and if full effect is given to all the exceptions the word "unseaworthiness" cannot have the limited meaning which Wills J. has given to it. Such a limitation would practically take away from the term "unseaworthiness" the whole of its meaning.

Then, lastly, with regard to the point on which Wills J. relied, namely, the expression "unseaworthiness of the ship at the beginning or at any period of the voyage," I think it is not a sound inference that it was intended to exclude the period of loading. I think the words "at the beginning or at any period of the voyage" were inserted, not with the view of narrowing the term "unseaworthiness," but to shew that it was not to be limited. There are cases in which it has been held that similar expressions ought to receive the full meaning which I am indicat-

ing, and not to be thus limited. For instance, in *The Carron Park* (1) shipowners had stipulated that they should not be liable for neglect, &c., of their servants "during the voyage," and it was contended that "during the voyage" applied only to the time at which the voyage commenced, and that at any rate the voyage could not begin before the ship's loading was completed. But it was pointed out by the President, following other authorities to which he referred, that the expression, being a general one, would cover the period during which the ship had to go from her then berth to the port of loading and would cover the period of loading. Would not a warranty of seaworthiness at the beginning or during the voyage standing alone, without any context to cut it down, cover, so far as concerns the cargo, the period of loading? I think it clearly would. In fact, for the purposes of the cargo and of the warranty that the ship is fit to receive it, the voyage really begins when the cargo is put on board, and I think that primâ facie the expression with which we have now to deal ought not to receive another interpretation. To my mind there is nothing to justify us in so interpreting it.

In my opinion this argument for the respondents also fails, and it follows that the appeal must succeed.

STIRLING L.J. I have arrived at the same conclusion, and substantially for the same reasons as my learned brothers. But, as we are differing from Wills J., and out of respect to the very able arguments which have been addressed to us, I will endeavour to state as shortly as possible the general grounds on which I think the appeal ought to be allowed.

We have here to deal with a bill of lading which on its face presents difficulties of construction. It bears marks of not having been all framed at one and the same time, but of having been added to or altered from time to time, probably to meet the exigencies of commerce as various difficulties arose. But the general object is to limit the liability of the shipowners and to relieve them from the general obligations imposed on them by law. The shipowners contract to deliver the goods

(1) 15 P. D. 203.

C. A. 1903

RATHBONE BROTHERS & Co. v. D. MACIVER, SONS & Co.

Stirling L.J.

in good order and condition at the port of discharge, but they except from that liability various matters, and (amongst others) all damages arising from the consequence of any defect in the hull or machinery or other appurtenances of the ship, "however such damage may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel." It is contended that, if those words stood alone, they would be sufficient to exonerate the shipowners from liability by reason of the unseaworthiness of the vessel, which is one of the liabilities attaching to them by law. Cases were referred to as establishing this, and I will assume that such would be the effect of the clause in the absence of any context. But in construing documents, and especially documents of this kind, it is not safe to deal with the contract piecemeal, but in ascertaining the meaning of one portion of it regard must be had to the context. Now in the later part of this bill of lading there are these words: "whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by the negligence of the owners, master, &c., and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage; provided all reasonable means have been taken to provide against such unseaworthiness." This portion of the document cannot have been introduced for the purpose of enlarging the perils, causes, or things which are to be excepted, because it begins by a reference to "the perils, causes, or things above mentioned." The object of it must therefore be to define the limits of exemption with reference to the perils, causes, and things which have been mentioned in the prior part of the bill of lading. Consequently, it seems to me that the earlier part of the document cannot be read in the wide sense which the respondents desire—namely, as excluding all liability whatever on the part of the shipowners by reason of unseaworthiness. I think the two parts must be read together; and so reading them I come to the conclusion that the shipowners were intended to be liable for unseaworthiness unless all reasonable means had been taken by them to provide against it.

That being so, the question then arises, What is the meaning of "unseaworthiness"? As Wills J. said, the word admits of two meanings—the one relating to the fitness of the ship to encounter the perils of the sea; the other in relation not only to that fitness, but also to the fitness of the ship and her equipment to carry the particular goods with which she is to be loaded. I agree with the learned judge that the word "unseaworthiness" is appropriate with reference to both these species of fitness. He, however, thought that in this bill of lading the word must be limited to that which he calls the narrower sense of unseaworthiness—namely, unfitness of the ship to encounter the perils of the sea. I am unable to agree with him in this respect. Looking at the object of this clause, I cannot doubt that the shipowners intended to exempt themselves as widely as possible from liability, and that they meant that everything which the term "unseaworthiness" would appropriately cover was to be within the exemption. But it is not absolutely necessary to decide that point; for the cases which have been referred to shew that when a shipowner desires to relieve himself of his common law liability he must do so in plain and unambiguous language, and in my judgment that has not been done in the present case. The result is that either unseaworthiness must be read in the wider sense, or the unfitness of the ship to receive the cargo intended to be carried is not excluded. In either view the shipowners fail.

Appeal allowed.

Solicitors: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool; Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

W. L. C.

Applied. RAILWAY EXECUTIVE *v.* YORKSHIRE (WEST RIDING) C.C. [1949] 1 All E.R. 836.

1903
July 16.

WEST LANCASHIRE RURAL DISTRICT COUNCIL *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company—Level Crossing—Road Raised on Inclined Planes—Repair of Roadway—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.

A railway company, being authorized to carry their railway across a high road upon the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under the powers conferred by s. 16 of the Railways Clauses Act, 1845:—

Held, that there was no obligation upon the railway company to repair the roadway upon the inclined planes, notwithstanding that their act in inclining its surface might have made its maintenance more expensive than before.

SPECIAL CASE stated by consent of the parties under Order XXXIV., r. 1.

The plaintiffs are the highway authority for the West Lancashire rural district, in which is situate a certain highway leading from the township of Maghull to the township of Melling.

The defendants are the owners of the Liverpool, Ormskirk and Preston Railway. A portion of the railway is within the plaintiffs' district, and its construction by the Liverpool, Ormskirk and Preston Railway Company was authorized by a special Act, with which the Railways Clauses Consolidation Act, 1845, was incorporated. By the said Act the railway company were empowered to construct the railway across and on the level of the said highway.

The railway company constructed the railway across the highway at a higher level than that of the highway, and in order to carry the highway across their railway they raised the level of the highway within the limits prescribed by the Act, and constructed upon each side of the railway where the railway crossed it a permanent inclined plane whereby the highway was raised to the level at which the railway was

constructed across it. The company erected gates upon each side of the level crossing at the points where the inclined planes respectively began to descend from the level of the railway.

The undertaking of the said railway company subsequently became vested in the defendants.

The portions of the highway which were raised as aforesaid were from time to time kept in repair and maintained by the defendants or their predecessors until the defendants repudiated their liability to do so as hereinafter stated, and the same had never been repaired or maintained by the highway authority of the district in which the highway is situate previously to the execution by the plaintiffs thereon of the work hereinafter mentioned.

On December 4, 1901, the defendants wrote to the plaintiffs stating that they had been advised that they were not liable for the maintenance of any portion of the road outside the crossing gates, and giving notice that they would cease repairing the road outside the crossing gates from that date.

The said portions of the highway having since that date fallen into disrepair, it was agreed between the plaintiffs and the defendants that the plaintiffs should execute the necessary repairs, and that the defendants should repay to them the sum of 90*l.*, expenses incurred by them in so doing, if the Court should be of the opinion that the defendants were liable to repair the said portions of the highway.

The plaintiffs, having executed the repairs pursuant to the agreement, brought the action to recover the said sum of 90*l.*

The question for the opinion of the Court was whether the defendants were liable to repair the said portions of the highway.

R. Cunningham Glen, for the plaintiffs. The raising of the roadway upon the inclined planes up to the level of the railway was carried out under the powers conferred by s. 16 of the Railways Clauses Act, 1845, which provides that "it shall be lawful for the company, for the purpose of constructing the

1903

WEST LANCASHIRE RURAL COUNCIL v. LANCASHIRE AND YORKSHIRE RAILWAY.

railway . . . . to execute any of the following works: (that is to say) They may make or construct . . . . upon . . . . any . . . . roads . . . . such temporary or permanent inclined planes . . . . as they think proper." And the section goes on to say that "they may from time to time alter, repair, or discontinue the before-mentioned works or any of them." That section does not render it obligatory upon the company to construct the works mentioned at all—it merely empowers them to do so; but, inasmuch as the works when executed might be a nuisance unless repaired from time to time, the inference is that the Legislature intended that if the company elected to construct the works they should do so on the terms of their exercising their power of keeping those works in a condition of repair. The provision that they may "repair or discontinue" the works would seem to point to this conclusion. Then if the company are bound to repair the inclined planes, they are also bound to repair the roadway on the surface of those planes, especially as the inclination of the surface would necessarily increase the expense of repairing the roadway. This follows from the decision of the House of Lords in *Lancashire and Yorkshire Ry. Co.* v. *Bury Corporation.* (1) It was there held that where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of s. 46 of the Railways Clauses Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, upon the ground that the roadway is part of the bridge, which by the section the company are bound to maintain. There the railway was in a cutting, and the previously existing level of the road was not altered by the construction of the bridge. But Lord Herschell suggested that the same principle would apply to the approaches of a bridge where the railway was on the level and the road had to be raised on inclined planes to allow of its passing over the bridge. And in arriving at that conclusion he was largely influenced by the fact that "there being an ascent and a descent contemplated on either side of the bridge, the cost

(1) (1889) 14 App. Cas. 417.

of repairs would be enhanced by the fact that the road passed over the bridge instead of passing in its former course, and that would be a reason for imposing this perpetual obligation upon the railway company." It is true that in an analogous case of the level of the highway being lowered to allow of its being carried under the railway the Court of Queen's Bench held in *London and North Western Ry. Co.* v. *Skerton* (1), following two earlier decisions in the Irish Courts, that the railway company were not bound to keep the slopes in repair. But that decision proceeded upon the ground that the lowered portion of the road was not part of the "approaches" to the bridge over which the railway was carried within the meaning of s. 46. The point that they were bound to repair the sloping portions of the road as being "inclined planes" under s. 16 was not taken.

Rowlatt, for the defendants. The only obligation upon a railway company who alter the level of a road, as in the present case, is that imposed by s. 56 of the Railways Clauses Act, 1845, namely, to see that it is "restored to as good a condition as the same was in at the time when the same was first interfered with by the company." When once that is done there is no further duty to repair.

WRIGHT J. I think Mr. Glen is right in saying that his case depends entirely upon the construction to be put on s. 16. Apart from that, I agree with Mr. Rowlatt that under s. 56 the obligation of the company is discharged as soon as they have restored the road to as good a condition as it was in before it was altered. Then does s. 16 support the plaintiffs' contention? I agree that the alteration of the level of the road and the construction of the two inclines must be referred to the authority contained in s. 16. But that section does not contain any words expressly obliging the company to keep in repair the portions of the road which they have interfered with under its authority. It is contended, however, that the provision that they "may from time to time alter, repair, or discontinue the before-mentioned works or any of them" imports that so

(1) (1864) 5 B. & S. 559.

1903

WEST LANCASHIRE RURAL COUNCIL v. LANCASHIRE AND YORKSHIRE RAILWAY.

Wright J.

long as they continue the works they are obliged to repair whenever the occasion arises, and that the Legislature must be taken to have intended that the company shall exercise the power of repair when it is for the public benefit that they should do so, especially when, as here, it is their own operation in putting the road on an incline which has presumably rendered the burden of repair heavier than it was before the line was made. I do not think that the words of s. 16 are apt words to create any such duty. So to interpret them would involve reading the word "shall" instead of "may." If I were to accede to the plaintiffs' contention, I should be making an enactment instead of construing one. There must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for A. Dickinson, Ormskirk.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Moorhouse, Manchester.*

J. F. C.

HAMBRO *v.* BURNAND AND OTHERS.

1903
June 9, 10, 11, 12, 15, 16, 17, 18, 30.

Principal and Agent—Limited Authority—Contract made by Agent in Name of Principal, but for his own Benefit—Liability of Principal.

B., an underwriter, was employed by certain other underwriters as their agent to underwrite policies in their names and on their behalf. B., purporting to act under that authority, underwrote in their names a policy guaranteeing to the plaintiffs that a certain company would repay to the plaintiffs the amount of certain advances made by the plaintiffs to the company. At the time that B. so underwrote the said policy the company was to the knowledge of B. in fact insolvent. B. was personally interested in the company being kept afloat, and in underwriting the policy was acting for his own interests and not for the interest of his principals. The company having failed to repay the advances, the plaintiffs sought to recover from B.'s principals upon the policy:—

Held, that, having regard to the object with which B. subscribed the names of his principals to the policy, he did not underwrite it on their behalf, and that consequently, as he had exceeded his authority, they were not liable to the plaintiffs.

TRIAL before Bigham J. without a jury.

The plaintiffs, Messrs. C. J. Hambro & Son, were bankers in London, and the defendants, Burnand, Read, Mordan, Draffen, and Elwell, were underwriters and members of Lloyd's. By several agreements in writing Burnand was employed by the other four defendants respectively as their agent to underwrite policies of insurance and carry on the ordinary business of an underwriter at Lloyd's in their respective names and on their behalf, in accordance with the usual custom of Lloyd's.

On October 1, 1902, Burnand, purporting to act in pursuance of the said authorities, underwrote in the names of himself and the other four defendants for 700*l.* each the following document:—

"To Messrs. C. J. Hambro & Son.

"In consideration of your accepting at our request the drafts of Henry Gaze & Sons (hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from October 1, 1902,

1903

HAMBRO v. BURNAND.

and in consideration of the premium of 1 per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that if the drawers do not at or before maturity of any such drafts put you in funds to meet the same we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and expenses which you may have to pay or to which you may be put by reason of your having accepted such drafts or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded."

The underwriting of a guarantee policy of this description was, as the judge found, part of the ordinary business of an underwriter at Lloyd's.

On October 9 the plaintiffs accepted a bill drawn by Gaze & Sons for 1000*l.* The bill fell due on January 10, 1903, and Gaze & Sons failed to meet it. The action was brought to recover from the defendants under the said guarantee policy the sum of 200*l.* each, being their respective proportion of the dishonoured bill. At the time when Burnand underwrote the policy in question Gaze & Sons were, and for some time previously had been, to the knowledge of Burnand insolvent. Burnand was a shareholder and also a director of Gaze & Sons, and was personally interested in keeping the company floating. He was also indebted to the company in a large amount. Though the policy expressed the premium of 1 per cent. to have been paid, it was never in fact paid, but was with Burnand's assent retained by Gaze & Sons, as his debt to them far exceeded the amount of the premium. There was evidence that at the time when the plaintiffs accepted the draft for 1000*l.* Gaze & Sons had already exceeded their borrowing powers.

Isaacs, K.C., *Hamilton, K.C.*, and *A. Read*, for the defendant Read. Assuming that Burnand had the authority of his co-defendants to underwrite a policy of this description in their names for them and on their behalf, he did not in fact exercise that authority. He did not underwrite it for them and on their behalf, but for his own private purposes. He was financially interested in Gaze & Sons as a shareholder and a director, and was consequently personally interested in the maintenance of their credit. On the other hand, he knew that they were insolvent, and that the subscribing of such a guarantee policy must necessarily be prejudicial to his principals. Moreover, he intended that the premiums on the policy should be retained by Gaze & Sons and set off against his own debt to them. He never intended that his principals should derive any benefit whatever from the transaction. But if an agent having authority to do an act for his principal, though purporting to do it for his principal, in fact does it on his own account, the principal cannot be held bound. Thus in *Salomons* v. *Pender* (1), where an agent employed to sell land sold it to a company in which he was interested as a shareholder and director, it was held that he was not entitled to any commission from his employer in respect of the sale, the reason given by Bramwell B. being that the agent had departed from his authority in making a bargain in which he was interested, and that the contract was consequently void. It was conceded in that case that the principal might, as against the purchasers, have refused to complete the sale. A person who contracts with an agent must ascertain for himself whether the agent has in fact the authority which he professes to have, and, if that authority is limited, he must ascertain whether the conditions of its exercise have been satisfied. If he contracts without inquiry, he does so at his own peril. Some support is given to the defendants' contention by the decisions with respect to the liability of principals in the analogous cases of wilful torts committed by their agents. The test of liability in such cases is whether the agent did the act for his principal's benefit or for his own. In *Barwick* v. *English Joint Stock Bank* (2)

(1) (1865) 3 H. & C. 639.

(2) (1867) L. R. 2 Ex. 259, at p. 265.

1903

HAMBRO v. BURNAND.

Willes J. laid it down that "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." That limitation of the principal's liability has repeatedly been cited with approval, e.g., per Lord Selborne in *Houldsworth* v. *City of Glasgow Bank* (1), per Lord Brampton in *George Whitchurch, Limited* v. *Cavanagh* (2), and per Bowen L.J. in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) That principle, as was pointed out by Lord Selborne in *Houldsworth's Case* (4), "is a principle, not of the law of torts, ... but of the law of agency." And, being a principle of the law of agency, it must equally operate to limit the principal's liability in a case of contract as well as in that of tort. [He also referred to *Coleman* v. *Riches* (5) and *Grant* v. *Norway*. (6) (7)]

Lush, K.C., and *Loehnis*, for the defendant Draffen.

Bray, K.C., and *Ashton*, for the defendant Mordan.

Maurice Hill, for the defendant Elwell.

Ernest Pollock, for the defendant Burnand. As Gaze & Sons had exceeded their borrowing powers at the time when the plaintiffs accepted their draft, the advance of the 1000*l.* to the company was illegal, and the plaintiffs could not legally recover the amount from Gaze & Sons. The defendants, therefore, including Burnand, were under no legal liability to indemnify the plaintiffs under the policy.

Scrutton, K.C., and *Mackinnon* (*Asquith, K.C.*, with them), for the plaintiffs. Even if Burnand was interested in the making of the policy sued on, that fact is not enough to render the policy invalid as against innocent third persons. The case of *Salomons* v. *Pender* (8) is no authority for such

(1) (1880) 5 App. Cas. 317, at p. 326.

(2) [1902] A. C. 117, at p. 140.

(3) (1887) 18 Q. B. D. 714, at p. 717.

(4) 5 App. Cas. at p. 326.

(5) (1855) 16 C. B. 104.

(6) (1851) 10 C. B. 665.

(7) It was also contended by the plaintiffs, as against two of the defendants, that even if Burnand had exceeded his authority in subscribing the policy in his principals' names, they had ratified and adopted his act. But as the judge held that there was no evidence to support a case of ratification, the argument on that point has been omitted.

(8) 3 H. & C. 639.

a proposition, for there the agent who sold was himself one of the purchasers.

With regard to the point that Burnand did not make the policy for the benefit of his principals, that is immaterial. An agent makes a contract for his principals when he makes it in their names. It is enough that, having general authority to do so, he purports to make it on their account. In *Summers* v. *Solomon* (1), where an agent purported to buy goods for his employer, but really bought them for himself, intending to abscond with them, the employer was held liable to pay for them. The principle of *Barwick* v. *English Joint Stock Bank* (2) does not apply to cases of contract. An agent rarely has express authority to commit a tort, and it is because the master is liable for the unauthorized torts of his servant that the Courts have in the case of wilful torts introduced the limitation of the master's liability that the servant must have been acting for the master's benefit. A contract, on the other hand, is a thing which the agent is expressly authorized to make, and there is no corresponding reason for limiting the principal's liability to contracts which are made for his benefit as well as in his name. In *Thorne* v. *Heard* (3) the action was by a second mortgagee against first mortgagees, who had sold under their power of sale, for an account of the balance of proceeds of sale. The person who had acted as solicitor for the first mortgagees in the transaction had concealed the fact of the sale from the plaintiff and misappropriated the balance; and the question was whether the first mortgagees were party or privy to the solicitor's fraud so as to deprive them of the protection of the Trustee Act, 1888. Lord Herschell said (4): "If the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal"; thereby suggesting that in such a case it would be enough to charge the principal if the agent purported

(1) (1857) 7 E. & B. 879.
(2) L. R. 2 Ex. 259.
(3) [1895] A. C. 495.
(4) [1895] A. C. at p. 502.

1903

HAMBRO v. BURNAND.

to do the act on the principal's behalf. In *Keighley, Maxsted, & Co.* v. *Durant* (1) it was held by the House of Lords that a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party, if the person who made the contract did not profess at the time of making it to be acting on behalf of a principal. So here the question is not, For whom did the agent intend to contract? but, For whom did he purport to contract? What is in the agent's mind is immaterial. The authorities shew that, whatever Burnand's intention was, the fact that he purported to enter into a contract on behalf of his co-defendants binds them if they had given him a previous authority, and enables them to ratify the contract if they had not. In *Montaignac* v. *Shitta* (2) it was held that where an agent purports to bind his principal, having general authority to do so, a person who bonâ fide enters into a contract with the agent is not bound to inquire whether in the particular case the agent was exceeding the authority.

[They also referred to *In re Tiedemann and Ledermann Frères.* (3)]

Hamilton, K.C., in reply. The case of *Montaignac* v. *Shitta* (2) is distinguishable, for there there was nothing to suggest that the agent was acting for himself and using his principal's name for his own benefit.

Cur. adv. vult.

June 30. BIGHAM J. delivered the following written judgment:—This action is brought on what is called a guarantee policy, dated October 1, 1902, subscribed by the defendant Burnand in his own name and in the names of the other four defendants. The whole of the document is in print with the exception of the dates, the signatures, and the amounts placed against the signatures. It is addressed to the plaintiffs, Messrs. C. J. Hambro & Son, and is in the following words: "To Messrs. C. J. Hambro & Son. In consideration of your accepting at our request the drafts of Henry Gaze & Sons

(1) [1901] A. C. 240. (2) (1890) 15 App. Cas. 357.
(3) [1899] 2 Q. B. 66.

(hereinafter called the drawers) to such an amount as you may think proper, such drafts to be drawn and accepted within one year from October 1, 1902, and in consideration of the premium of 1*l.* per cent. paid to us by the drawers on the execution hereof (the receipt whereof we hereby acknowledge), we, the underwriters, agree that if the drawers do not at or before maturity of any such drafts put you in funds to meet the same we will within thirty days of receipt of notice from you of such default on the part of the drawers pay to you in cash the amount of such drafts, and will further indemnify and hold you harmless against all moneys, loss, costs, charges, and expenses which you may have to pay or to which you may be put by reason of your having accepted such drafts or by reason of any claims made by any company or person in respect of the transactions above mentioned, provided that our liability hereunder shall not exceed the amount of our respective subscriptions hereto with interest thereon at the rate of 5 per cent. per annum from the time of payment being demanded." The policy is then subscribed with the names of the five defendants, the names of the last four being subscribed in the handwriting of Burnand by procuration. On October 9, 1902, the plaintiffs accepted a draft of Gaze & Sons, Limited, at ninety days' sight, for 1000*l.* The bill fell due on January 10, 1903, and Gaze & Sons made default in finding money to meet it. Thereupon the plaintiffs claimed under the policy sued on to be paid by each of the five defendants his proportion—namely, 200*l.* of the amount. The substantial question in the case is as to the liability of the four defendants, Draffen, Read, Mordan, and Elwell, to make good this claim; and it is with reference to their liability that I propose first to deal. I shall refer to Burnand's position later on. The first of the four defendants, Colonel Draffen, became a member of Lloyd's in the year 1885. He never personally did any business there, but occasionally he visited the room for the purpose of seeing his friend Burnand. The defendant Read is Burnand's father-in-law. He was for a long time connected with railway business, but is now retired. He became a member of Lloyd's in 1891, but, like Draffen, he never personally did any business there. The

1903

HAMBRO v. BURNAND.

Bigham J.

defendant Mordan has been a member of Lloyd's for many years, and is well acquainted with the business done there; for some time he was in Burnand's office learning the business. The fourth defendant, Mr. Elwell, was at one time a merchant at Birmingham; he is now retired. He became a member of Lloyd's in 1887, but, like Draffen and Read, never personally did business there. The object which all these four defendants had in view in becoming members of Lloyd's was to underwrite risks there; and in order to carry out their object they employed the defendant Burnand, also a member of Lloyd's, to do the business for them. Membership is a condition imposed by the committee of Lloyd's on persons desiring to carry on the business of underwriting in the room. The terms of Burnand's employment were in each case reduced to writing. In Draffen's case the document states that Burnand "agrees to open and carry on at Lloyd's an underwriting account for and in the name of Draffen . . . . but Burnand shall not underwrite any risks for Draffen to a greater extent than he, Burnand, shall underwrite for himself." Burnand was to receive half the profits by way of salary, but he was not to be considered a partner. There are other provisions in the agreement as to the books to be kept by Burnand and as to the auditing and rendering of accounts. In Read's case the agreement recites that Read, having been admitted a member of Lloyd's, is desirous of carrying on the business of an underwriter there and of appointing Burnand to conduct such business on his behalf. The agreement then provides that Burnand "shall act as the agent of Read for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of Read, in accordance with the usual custom of Lloyd's." Burnand's remuneration was to be 200*l.* a year. The other provisions of the agreement, though not in the same words, are similar to those in Draffen's agreement. In Mordan's case the agreement recites that Mordan has for some time been carrying on the business of an underwriter at Lloyd's, and it then provides that Burnand "shall act as the agent of Mordan for the purpose of underwriting policies of insurance at Lloyd's

and carrying on the ordinary business of an underwriter at Lloyd's." Burnand was to have the sole management of the underwriting, and was to receive 250*l.* a year and 20 per cent. of the net profits as remuneration for his services. The other provisions are substantially the same as in Draffen's and Read's cases. In the case of Elwell, the agreement recites that Elwell is desirous of carrying on the business of an underwriter at Lloyd's and of appointing Burnand to conduct such business on his behalf, and it then provides that "Burnand shall act as the agent of Elwell for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's in the name and on behalf of the said Elwell, in accordance with the usual custom of Lloyd's." Burnand's remuneration is to be 260*l.* a year and 20 per cent. of the net profits. The further provisions are in effect the same as in the other three cases. I have set out the terms of the four agreements, because it is possible that different considerations might arise with respect to each case; but for my own part I think the four agreements are substantially the same in their effect: each amounts to an authority to Burnand to carry on an underwriting account at Lloyd's for and on behalf and in the name of the principal. For some years Burnand, acting for the defendants under the authority conferred by these documents, underwrote risks of different kinds at Lloyd's and rendered accounts to the defendants shewing the profits and losses resulting therefrom. It was not until the year 1900 that the transactions began out of which the present dispute arises. It appears that at the end of 1899 a representative of Messrs. Barings mentioned to the plaintiffs (who carry on a banking business) that they, Barings, were engaged in financing a firm of Gaze & Sons. Gaze & Sons were at this time tourist agents engaged in a business similar to that carried on by the well-known firm of Messrs. Cook & Sons. The financing consisted of accepting Gaze's drafts and taking by way of security what Barings described as "Lloyd's policies"; and it was suggested by Barings that the plaintiffs might think it worth their while to undertake a part of the business. The plaintiffs listened to this suggestion. They were satisfied with

1903

HAMBRO v. BURNAND.

Bigham J.

the introduction of the business by Barings, and they made little or no inquiry as to the stability of Gaze & Sons. As a result of this introduction Gaze & Sons put themselves into communication with the plaintiffs. This was at the end of 1899, and an arrangement was then made between Gaze & Sons and the plaintiffs that the latter should accept Gaze & Sons' drafts at three months, which Gaze & Sons should get discounted. The proceeds were to be used by Gaze & Sons for the purposes of their business. As the bills fell due Gaze & Sons were to furnish the plaintiffs with the necessary funds for retiring them. It was part of the bargain that Gaze & Sons should obtain and hand to the plaintiffs "Lloyd's policies," guaranteeing that Gaze & Sons should provide the necessary funds at the required time. The commission to be paid by Gaze & Sons to the plaintiffs for the accommodation was fixed at ½ per cent. on the amount of each acceptance. The first policy handed by Gaze & Sons to the plaintiffs was in the form now sued on, but it was for 3000*l.* It was dated January 1, 1900, and was subscribed by the defendant Burnand in his own name and in the names of three of the other defendants—namely, Draffen, Read, and Elwell—for 250*l.* each. It was also subscribed by a number of other underwriters for small sums, which made up an aggregate further amount of 2000*l.* In order to illustrate how the business was done, I may read two letters of December 29 and 30, 1899:—

"London, Dec. 29, 1899.

"Dear Sirs,—We are delivering to you on Monday the form of guarantee agreed upon last Friday, underwritten by Messrs. Faber and Burnand and Angove for a total amount of 3000*l.*, and are instructing our Paris agent to send you on Monday next a draft for 500*l.*, which please accept in accordance with our arrangement.

"We trust this will be all in order.

"We are, yours faithfully,

"Henry Gaze & Sons, Limited.

"To Messrs. C. J. Hambro & Sons,

"70, Old Broad Street, London, E.C."

"70, Old Broad Street, E.C.,
Dec. 30, 1899.

"Messrs. Gaze & Sons, Limited,
"142, Strand, W.C.

"Dear Sirs,—We are in receipt of your letter of yesterday and note the contents thereof.

"If the names of the underwriters are known to us and satisfactory (which we do not doubt) everything will be in order.

"We remain, dear Sirs, yours faithfully,
"C. J. Hambro & Son."

Faber and Angove were the agents of the smaller underwriters, who had underwritten the first policy for 2000*l.* Soon after this policy was handed over, bills to the amount of 3000*l.* were drawn by Gaze & Sons on the plaintiffs, and were accepted. Subsequently further policies were handed to the plaintiffs to secure additional bills, until, by November, 1900, the amount afloat of the plaintiffs' acceptances of Gaze & Sons' drafts reached as much as 14,500*l.* It was noticed by the plaintiffs that the later policies—namely, those after June, 1901—brought to them by Gaze & Sons, were subscribed only by Burnand and his names; the other underwriters, whose names appeared on the first policy for two-thirds of the amount, no longer being parties. When the plaintiffs observed this they insisted on Gaze & Sons procuring what are called "solvency policies"—that is to say, policies guaranteeing the solvency of the underwriters. These Gaze & Sons accordingly took out with the Royal Exchange Insurance Company and handed to the plaintiffs. Thus the plaintiffs had a triple security for their advances: they had the liability of Gaze & Sons, the guarantee of Burnand and his names, and a warranty by third parties of the solvency of Burnand and his names. After the total amount of the advances had reached 14,500*l.* the bills began to run off. By some means or other, probably by borrowing money elsewhere, Gaze & Sons found means to reduce the amount of their obligations to the plaintiffs, so that by the end of 1901 the bills afloat only amounted to 7500*l.* These bills were renewed from time to time during 1902, and

1903

HAMBRO v. BURNAND.

Bigham J.

the last of the series of renewals are now all in the hands of the plaintiffs, who have had to take them up out of their own moneys by reason of Gaze & Sons' default. At no time during the period over which this business extended—that is to say, 1900, 1901, and 1902—did the plaintiffs see Mr. Burnand. The business between the plaintiffs and Gaze & Sons seems to have been conducted, so far as Gaze & Sons were concerned, by a Mr. Parry, the managing director of the company, and by nobody else. But it now appears that during nearly all this time Burnand was a director of Gaze & Sons. He joined the board in August, 1900; and not only was he a director, but he was personally engaged in financial dealings with that company. Before the end of 1900 the plaintiffs became aware of the fact that Burnand was a director of Gaze & Sons, but they knew no more than that fact would convey to them. The company was never, in my opinion, solvent—that is to say, it never held real assets representing its nominal capital and its liabilities. It was not solvent when the first advances were obtained from the plaintiffs; its position after that date became rapidly worse; and it is now being wound up and has practically no assets. It was very much to Burnand's personal interest to keep Gaze & Sons going; for, having regard to the accounts which I have seen, the stoppage of Gaze & Sons at any time would have meant the stoppage of Burnand, or at all events would have caused him serious inconvenience. Burnand did not go into the witness-box during the trial before me, nor was Mr. Parry called by either side; but I have no doubt whatever that Burnand knew at all times what the financial position of Gaze & Sons was, and that in underwriting the Gaze policies (including the policy sued on) he was acting for himself and in furtherance of his own interests, and not for or in the interest of the four defendants with whose case I am now dealing. His conduct makes this abundantly clear. Transactions similar to those with the plaintiffs were carried out with other financial houses; so that by the end of 1902 the amount owing by Gaze & Sons to different creditors reached the large total of 110,000*l.*, the whole being bolstered up by policies such as that now sued on. Thus Burnand has purported to bind each of

the four defendants to an amount of upwards of 20,000*l.* on one risk—namely, the solvency of Gaze & Sons. He never obtained any premiums for the policies. Gaze & Sons never paid a farthing for them, although each policy contains the statement that Gaze & Sons have paid 1 per cent. premium. Indeed, Gaze & Sons' cashier stated in the witness-box that his instructions were to pay no premiums because none were due. Burnand never entered the policies in his business books, where in the ordinary course they should have appeared. He never introduced them into any of the accounts which he rendered to the defendants. At times during the three years over which the transactions extended Gaze & Sons made default in providing money to take up their drafts, whereupon the holders of the corresponding policies wrote to the defendants demanding payment. These letters were addressed to the defendants at Lloyd's, the only address then known to the writers. Burnand intercepted the letters and destroyed them, and managed out of his own means, or out of Gaze & Sons', to find the required money, and so to quiet the bankers for the time being. On one occasion in April, 1902, Mordan received information from a banker which led him to fear that his name was on policies guaranteeing Gaze & Sons. He accordingly went to Gaze & Sons' office to ascertain if it was true. He saw one of the clerks, who said he would inquire and let him know. Later in the day Lawrence, the cashier, under the instructions of Parry, wrote the following letter: "68, Old Bailey, London, E.C., April 24, 1902. Dear Sir,—Referring to your call here this afternoon, I beg to say that I have communicated to our chairman"—Mr. Parry—"the object of your visit, and he wishes me to inform you that your information is quite inaccurate, and that, should you deem it necessary to see him, he will be glad to keep any appointment at Gaze's office during to-morrow afternoon. I am, dear Sir, yours faithfully, T. B. Lawrence. P. C. Mordan, Esq." According to Lawrence's evidence, both he and Parry well knew that the letter was untrue. I cannot doubt that Burnand knew of this letter and approved of its being sent. Mordan's answer was as follows: "Private and confidential. Sanfils, Reigate,

1903

HAMBRO v. BURNAND.

Bigham J.

April 25, 1902. Mr. T. B. Lawrence. Dear Sir,—In reply to your letter of yesterday's date, the information I have received was private and confidential, and I have still no reason to doubt its accuracy. Now that you are aware that no one is authorized to sign guarantee insurance policies in my name, and that any claims arising thereon would be immediately repudiated, I have nothing more to say. Yours faithfully, Percy C. Mordan." At the end of 1902 the present plaintiffs issued a writ against all the five defendants in respect of a default made by Gaze & Sons in providing money for an earlier bill than the bill mentioned in the present action. Burnand instructed a firm of solicitors to appear to this writ. The four defendants never heard of it. Judgment was signed, and when attempts were made to serve bankruptcy notices on them personally in 1903 the defendants became aware for the first time that they had been sued. Some of them (it may be all of them) paid that claim in the vain hope that there were no more. Shortly afterwards the writ in the present action was issued (February 16, 1903). These facts confirm the view I take—namely, that Burnand was issuing the policies for his own purposes, and not for or on behalf of the other four defendants. It was contended on the plaintiffs' behalf in this connection that the earlier policies issued in 1900 were at all events honestly subscribed by Burnand on behalf of the four names, and that the policy sued on, though dated in 1902, was merely a renewal of one of these earlier policies, and could not, therefore, be regarded as a policy issued for Burnand's sole benefit. I do not, however, take this view of the facts. In my opinion the business was Burnand's and only Burnand's from beginning to end. The case, therefore, stands thus. Burnand held the written authorities already referred to. The plaintiffs never saw them or asked to see them or knew of their existence. Burnand issued the policy sued on for his own purposes, and not for or on behalf of the other four defendants. The plaintiffs took it without inquiry, relying solely on the representation on its face. The question is, Are the four defendants liable? The first point taken on their behalf was that the underwriting of documents such as that

sued on was not business which came within the meaning of the authority at all. It was said that it was not insurance, and therefore not within the authority; and further it was said that it was not business ordinarily transacted at Lloyd's. Perhaps in a strict sense it would be right to say that the contract sued on is not a contract of insurance; it is not a contract of indemnity against loss; it is an undertaking to pay a sum of money to the holder if some one else fails to find it at the proper time; a loss is not a necessary condition to the liability. But I do not place this narrow construction on the authority given by the defendants to Burnand. I think the authority extends to cover all business ordinarily done at Lloyd's. The words are, "underwriting policies of insurance at Lloyd's and carrying on the ordinary business of an underwriter at Lloyd's." Many witnesses were called before me from Lloyd's to speak as to the kinds of business done there, and their evidence satisfies me that the underwriting of policies such as the one sued on forms part of that business. It is, of course, not nearly so common as the underwriting of marine risks, but it is nevertheless part of the ordinary business, and indeed one of the defendants (Elwell) in terms said he understood it to be so. The next point was that, even if the authority given to Burnand warranted the signing of documents such as this, yet, as this policy was not signed for or on behalf of the four defendants, but for Burnand's benefit only, it did not bind them. It was said that such a contract was outside the authority which he held. There are only three ways in which a man can be bound by a contract made by one who purports to act as his agent in making it. First, he will be bound if the agent had in fact his authority to make the contract on his behalf; secondly, he will be bound if, though the agent had in fact no such authority, he has held out the agent as having such authority and has thereby induced the other party to enter into the contract; and, thirdly, he will become bound if, the contract having been entered into in his name but without his authority, he subsequently ratifies the agent's act. With the second of these three I am not concerned, for the plaintiffs' counsel disclaimed

1903

HAMBRO v. BURNAND.

Bigham J.

any intention of relying on a holding out, and I think he was right in doing so. There clearly was no holding out. Before the making of the contract sued on, the plaintiffs never were in communication either with the defendants or with Burnand, nor did they know of the existence of the written authorities which the defendants had given to Burnand. Both the defendants and Burnand were strangers to them, and remained so to the end of the business. When the policies were handed by Gaze & Sons to the plaintiffs, the only representation made to the plaintiffs was that Burnand had authority to sign for the defendants. This representation was made by Burnand on the face of the policies and in no other way, and apparently the plaintiffs were satisfied; they made no inquiries, and took the risk of the representation being true or false. In such circumstances it seems to me that as against the four defendants it is impossible to set up an estoppel by reason of a holding out. It appears to me that it is impossible to treat the representation which Burnand made when he signed the policies "per procuration" as the representation of the other defendants. It was untrue—untrue to his knowledge; and, in my opinion, an agent to make contracts on behalf of another has no power by his own unauthorized falsehood to create an estoppel against his principal so as in effect to entirely alter the scope of the authority. Estoppel can only arise out of the conduct of the man against whom it is set up. A case of ratification was attempted to be set up on behalf of the plaintiffs, but it was confined to two of the defendants, namely, Draffen and Mordan; it was admitted that it could not be relied on for the purpose of fixing either Read or Elwell with liability. With regard to Draffen and Mordan, the acts which are said to amount to a ratification were, in my opinion, not even evidence of a ratification. I need not detail what they were. It is enough to say that they had no reference to the policy sued on. At the time the acts were done these two defendants were in ignorance of the existence of this policy. They had never heard of it. To constitute a valid ratification of the unauthorized acts of an agent, "there must be full knowledge of what those acts were, or such an unqualified adoption that the inference

may properly be drawn that the principal intended to take upon himself the responsibility for such acts whatever they were": *Marsh* v. *Joseph*. (1) In the present case there was nothing in the facts which would justify me in drawing an inference of the kind mentioned; and as to knowledge, I have said that at the time of the alleged acts of ratification the defendants knew nothing about the policy sued on. Holding out and ratification being thus disposed of, it only remains for me to consider whether Burnand had in fact authority to bind, and did bind, his principals by the contract which he purported to make on their behalf. This question presents to my mind some difficulty. The plaintiffs contend that Burnand was in fact the general agent of the other four defendants to make contracts of the kind sued on, and that having purported to make such a contract on their behalf the defendants are bound. On the other hand, the defendants say that the only authority which Burnand had was to make contracts for their benefit and on their behalf, and that, this contract not having been made for their benefit or on their behalf, but for Burnand's benefit only, they are not bound. In the absence of any holding out, I know of no means of deciding upon these contentions, except by a reference to the documents under which alone Burnand's authority existed. These documents all declare that he is authorized to underwrite policies "in the name and on behalf of" the principals; nothing else. Does such a mandate authorize the making of a contract which is to enure only to the benefit of the agent? For my part, I think it does not. The mandate authorizes the making of contracts for and on behalf of the principals. It does not authorize the making of contracts for and on behalf of the agent. No doubt there are many cases in which a general agent to make contracts of a certain kind has been held to bind his principal by a contract of that kind, though made for his own purposes. But all such cases proceed upon the doctrine of estoppel by holding out. They are cases in which the other contracting party has been induced to enter into the contract by a representation made to him by the principal that the agent's acts were authorized. I

(1) [1897] 1 Ch. 213, at p. 246.

1903

HAMBRO v. BURNAND.

Bigham J.

can find no case where the extent of the authority of a general agent not held out as such has been measured by anything outside or beyond the actual terms in which the agency is created. Sometimes, in order to ascertain whether the principal is liable, the question is asked whether what the agent has done is within "the scope" of his employment. It is in my opinion a loose and unsatisfactory test of the liability; but, applying it in this case, I am satisfied that what Burnand did was not within the scope of his employment. It was to his own knowledge wholly without its scope. Nor is the case one of negligent or of tortious conduct in carrying out the agency entrusted to him. If it were, some liability might fall on the defendants. The making of the contract sued on was a wilful act not done in carrying out the agency at all, but done wholly outside it. In my view Burnand had no more right to sign this policy on the defendants' behalf than he had to forge their signatures to it. Again, it is sometimes said that where one of two innocent parties must suffer from the fraud of a third person, he who has enabled the third party to commit the wrong ought to bear the loss. I do not think this test is applicable to the present case, where the only question is one of authority. But even if it were applicable, it would, in my opinion, be wrong to say that the defendants had in fact enabled Burnand to commit the fraud. All they had done was to authorize him to underwrite risks for them; and the giving of such authority afforded him no additional facility for committing frauds. Then, again, it is said that even if the plaintiffs had asked to see the authorities, and had read them, they had no means of ascertaining whether the policies were issued for the benefit of the principals or not. That may be true. But my answer is, that a man is not to be held liable because it has been difficult or even impossible to ascertain whether he was liable or not. If a person contracts with an agent, it is for him to see as best he can that the agent is acting within his authority. If the authority exists by reason of a holding out, then the person making the contract must take care that the agent does nothing which the holding out does not warrant: if the authority does not arise from a holding

out, then care must be taken to see that what is being done is within the terms of the actual authority. It is often difficult, or inconvenient, or impolitic to make inquiries about an agent's authority, but that circumstance does not make the principal liable where he is otherwise not liable. The other contracting party takes the risk, and, though now and then it turns out that the risk is serious and real, the event is not of sufficient frequency to interfere with business. The view, then, that I take of this case is that the plaintiffs are not entitled to rely on any authority except such as is to be found in the documents; that the authority to be there found is limited to the making of policies "for" the defendants; that the policy sued on was not made "for" the defendants, and that therefore they are not bound by it. In shorter words, I think it is the plaintiffs whom Burnand cheated and not the defendants, and that the loss must lie where it has fallen. The law is, I think, accurately stated in Story on Agency, s. 133, at p. 149 of the 9th edition: "Where the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent, beyond what he has apparently authorized; because he has not misled the confidence of the other party who has dealt with the agent. Each party is equally innocent; and in a just sense it cannot be said that the principal has enabled the agent to practise any deception upon the other party. The duty of inquiring then is incumbent upon such party, since the principal has never held the agent out as having any general authority whatsoever in the premises. And if he trusts without inquiry, he trusts to the good faith of the agent and not to that of the principal."

Several cases were cited in the course of the argument, and I think it is better that I should notice them. On behalf of the plaintiffs the case of *Summers* v. *Solomon* (1) was relied on.

(1) 7 E. & B. 879.

1903

HAMBRO v. BURNAND.

Bigham J.

It is a case which shews that a general agent may pledge his principal's credit though he does it only for his own benefit. But when examined it will be found that it was a case of holding out. The Court found as a fact that the principal had made a continuing representation that goods bought by the agent on a representation by him that they were required for the principal's business would be paid for by the principal. The judgment proceeded on this ground. Then an expression of Lord Davey's in *Keighley, Maxsted & Co.* v. *Durant* (1) was mentioned: "Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable." This detached passage is, however, quite useless unless read with its context, and with reference to the case then under consideration, and when so read it will be seen to have no bearing on the question which I am now dealing with. A third case relied upon was *In re Tiedemann* (2), the head-note of which is as follows: "Where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers." That case is not in point. I do not doubt that if the defendants had ascertained the existence of these policies and had chosen to ratify them they could have done so. For the purpose of ratification it is sufficient that the contracts on their face purport to be made on the defendants' behalf. But the question which I have to consider is not whether the defendants could have ratified, but whether the contracts bind them without ratification. Another case cited on behalf of the plaintiffs was *Thorne* v. *Heard*. (3) The question in that case was whether the respondents were "party or privy" to the fraud of one Searle within the meaning of s. 8 of the Trustee Act, 1888, so as to debar them from taking advantage of the Statute of Limitations, and Lord Herschell refers in general terms to the circum-

(1) [1901] A. C. 240, at p. 256. (2) [1899] 2 Q. B. 66.
(3) [1895] A. C. 495.

stances in which a principal may or may not be liable for the torts of his agent. He says (1): "It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal." This passage was cited as an authority for the proposition that it is sufficient in order to make the principal responsible that the agent should purport to do the act for the principal; and that it does not matter that, in fact, it is not done for the principal. I do not think the passage is really an authority for such a proposition. Lord Herschell was dealing with the responsibility of a principal for the torts of his agent; and, in using the disjunctive "or" in the last sentence, he certainly did not mean to say that by merely purporting to act for the principal he could make the principal responsible for a tort. Another case cited was *Montaignac* v. *Shitta*. (2) The head-note is as follows: "Where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business:—*Held*, that the lender was not bound to inquire whether in the particular case the emergency had arisen or not; but that he was entitled to recover from the principal if he lent to the agent bonâ fide and without notice that the agent was exceeding his mandate." But this case is of no real value for the purpose in hand. An examination of the

(1) [1895] A. C. at p. 502.

(2) 15 App. Cas. 357.

1903

HAMBRO v. BURNAND.

Bigham J.

facts will shew that the agent was acting within his authority, although, perhaps, improvidently; there is no suggestion that he was acting for his own benefit. Moreover, as Lord Herschell says in his judgment, the only question under review was a question of fact.

The authorities cited in support of the defendants' contention appear also to be inconclusive. No case in contract was referred to in which it is clearly laid down that a general agent has no authority to bind his principal by a contract of the kind authorized by the terms of the agency, but made for the agent's own purposes. But some cases in tort, which are perhaps analogous, were cited. In *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) it appeared that the defendant company had held out their secretary to the plaintiffs as a person to answer inquiries as to the validity of the defendant company's bonds. The plaintiffs accordingly made inquiries as to the validity of certain bonds which had been offered to them in pledge, and the secretary answered that they were validly issued. This statement was untrue to the secretary's knowledge, and was made by him for his own ends, and not in the interest of his employers. In an action of deceit the defendant company were held not liable. It was said that though the secretary must be taken to have had authority to answer questions of the kind put to him, he had not been held out as having authority to answer such questions when acting for his own ends and not for the benefit of his employers. I refer to the judgment of Lord Esher (2): "The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of the defendants, he being authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist, and could assist by making the false statements, and as he made them in his own interest

(1) 18 Q. B. D. 714. (2) 18 Q. B. D. at p. 716.

or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting 'for the benefit' of the principal. This in my opinion is equivalent to saying that he must be acting 'for' the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest." Judgments were also delivered by Bowen L.J. and Fry L.J., but I do not propose to read them, because they were to some extent based on the fact that the alleged estoppel could not bind the defendants, inasmuch as they were a corporation. But Lord Esher M.R. puts the decision upon the broader ground, that the statements having been made by the secretary to serve his own ends could not bind his employers. In *Houldsworth* v. *City of Glasgow Bank* (1) an action was brought by a shareholder against the liquidators of the bank for damages for misrepresentation made by the directors before the stoppage of the bank, whereby he had been induced to become a shareholder. Lord Selborne in his opinion said: "My Lords, the principle on which the cases of *Barwick* v. *English Joint Stock Banking Co.* (2), *Mackay* v. *Commercial Bank of New Brunswick* (3), and *Swire* v. *Francis* (4) (relied upon by the appellant) were decided, was thus stated by Mr. Justice Willes in the former of those cases, and repeated (from his judgment) by the Judicial Committee in the two latter: 'The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit,' because, although the master may not have authorized the particular act, 'he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.' To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable,

(1) 5 App. Cas. 317.
(2) L. R. 2 Ex. 259.
(3) (1874) L. R. 5 P. C. 394.
(4) (1877) 3 App. Cas. 106.

1903

HAMBRO v. BURNAND.

Bigham J.

and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases. That principle received full recognition from this House in *National Exchange Co.* v. *Drew* (1) and *New Brunswick Ry. Co.* v. *Conybeare* (2), and was certainly not meant to be called in question by any of the learned Lords who decided *Addie* v. *Western Bank of Scotland.* (3) It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's Case* (4)), 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'" And the opinion of Lord James of Hereford in *George Whitechurch, Limited* v. *Cavanagh* (5) was also read in support of the defendant's case: "There is on the one hand a risk cast on the members of the public who rely upon the honesty of the agents; but how far greater would be the risk of the principal if he were to be liable for the frauds of the agent, which might be effected to an unlimited extent ruinous to the principal? It appears to me to be impossible to hold the company bound by the act of Wells without overruling the judgment in the case of *Grant* v. *Norway.* (6) In that case the master of a vessel had authority from the shipowner to give bills of lading for goods received on board. The master fraudulently gave bills of lading for goods not received by him. It was held, and the judgment has since been acted on and approved of in your Lordships' House, that the master, not having acted within his agency, the shipowner was not liable on the fictitious bills of lading. By this decision a great risk is thrown upon indorsees of bills of lading, who may find their

(1) (1855) 2 Macq. 103.
(2) (1862) 9 H. L. C. 711.
(3) (1867) L. R. 1 H. L., Sc. 145.
(4) L. R. 2 Ex. 259.
(5) [1902] A. C. 117, at p. 134.
(6) 10 C. B. 665.

securities valueless through the fraud of the masters of vessels, and this inconvenience was pressed in the argument of the case, but without avail, and apparently the commercial world has not found such inconvenience to be so great as was suggested in argument." The rules laid down in these cases of tort may not be strictly applicable to a case of contract, but they appear to me to support the principle that an agent who is not in fact acting for his principal cannot bind him by merely purporting so to act.

Since the argument my attention has been called to a passage in Story on Agency, 9th ed. p. 91, s. 73: "If the written authority apparently justifies the act, it is no objection that the agent has secretly applied his authority to other purposes than those for which it was given; as if, having an authority to make notes in the principal's name in managing his business, the agent should make such notes for secret purposes of a different nature, which could not be known to other persons dealing with him." In support of that statement there is cited the American case of *North River Bank* v. *Aymar*. (1) That case appears to be so much in point that I think I ought to refer to it in some detail. The facts are shortly stated in the head-note as follows: "P. gave J. a letter of attorney authorizing the latter, among other things, to draw and indorse notes in the name and for the benefit of the former; and the letter was deposited with a bank through which it was expected some of the business would be done. Various notes and indorsements were subsequently made by J., all of which purported on their face to have been executed for P. in conformity with, and in pursuance of, the letter of attorney. In truth however the notes had no connection with P.'s business, but were given for the accommodation of third persons, who indorsed them to the bank in which the letter of attorney had been deposited—the latter receiving them in the regular course of business, without notice, and for a valuable consideration: *Held*, that P. was liable to the bank on the notes, though as between him and J. they were unauthorized and fraudulent. Nelson Ch.J. dissented." The terms of the

(1) (1842) 3 Hill, 262.

1903

HAMBRO v. BURNAND.

Bigham J.

authority are set out on p. 264, and are as follows: "Know all men, &c., that I Pexcel Fowler of, &c., have made Jacob D. Fowler of, &c., my true and lawful attorney, for me and in my name, place and stead, and to my use, to ask, demand, &c., all such sum and sums of money, debts, &c., which are, or shall be due, owing, &c., to me, &c. I do further authorize and empower the said Jacob D. Fowler to draw all checks or drafts upon any of the banks in the city of New York for all moneys deposited in my name, to indorse any promissory note or notes, bills of exchange or drafts, to accept all bills of exchange or drafts, or in my name to draw any note or notes." Both the principal and the agent took this document to the plaintiffs' bank and left it with the manager, the object of course being that the bank should act upon it. The case was tried before a jury, and the judge directed the jury that as Jacob Fowler had exceeded his authority the plaintiffs could not recover. On appeal to a Court of three judges it was held by Cowen J., in a judgment with which Bronson J. concurred, that the direction was wrong. The third judge, Nelson Ch.J., dissented. The reasoning of Cowen J. is to be found at p. 266, where he says: "The general rule, that when an attorney does any act beyond the scope of his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it. I say in acting under it; for it is easy to compare the act with the words to which it must conform; and so far there is nothing unreasonable, nothing impossible or even difficult. In speaking of the attorney's acts I certainly mean to include his declarations made at the time or in the business which he transacts under the power; for his declarations are a part of the res gestæ, and bind his

principal equally with the act to which they relate. They are always received as evidence against the principal. I authorize a man to borrow a sum of money for me. The power being limited he has no authority to borrow for himself or his neighbour. He goes to the lender and borrows in my name, shewing him my written power, and declaring at the same time that he takes the loan on my account. Both his acts and declarations are evidence against me." Now I think there is a mistake here. In my opinion the principal is not affected by the lie which the agent tells unless there was something done by the principal or properly imputable to him which led the other contracting party to believe that he might rely on the statement. In the absence of such conduct on the part of the principal, I do not think the declarations of the agent are evidence against the principal. Nor do I think that the authorities which Cowen J. cites in support of his proposition really bear it out. Many, if not all of them, will be found to turn upon estoppel by the conduct of the principal himself. The judgment of Nelson Ch.J. appears to me to be in accordance with principle and with authority. He says: "The attorney's power was limited, in express terms, to the business of the principal; and the use of his name for the benefit of D. Rogers & Son was without authority and therefore void. The plaintiffs are moreover to be deemed cognizant of the special limitation contained in the letter of attorney, for it was deposited with them and remained in their possession down to the time of discounting the notes in question; and even without this, as the notes were signed by an attorney, it was their duty to inquire into his authority. Being thus advised the plaintiffs must be regarded as having discounted the paper under the hazard of shewing, before they can charge Pexcel Fowler or his representatives, that it was made and negotiated by the agent within the precise limit of his authority; and they were therefore properly required to prove that the notes were given in the business of the principal. Having failed to do this I am of opinion that the direction of the Court below was right. It is insisted the bank was not bound to inquire further than to ascertain that the attorney was

1903

HAMBRO v. BURNAND.

Bigham J.

empowered to make and indorse notes for his principal. But the same instrument which conferred this power, also contained the special limitation, and it was therefore as material for them to bring the case within that as within any other part of the authority. The one qualified the other, and both must be regarded in ascertaining the sum of the whole." He goes on to say later on in his judgment: "But it is insisted, the plaintiffs had a right to assume that the notes were made in the course of the business of Pexcel Fowler, and therefore within the authority of the attorney; or, if not, that the plaintiffs were at least justified in relying upon the implied representations of the agent that they were notes of this description, as evinced by his act in making and putting them in circulation. I cannot assent to either of these propositions. The plaintiffs having the letter of attorney before them are chargeable with notice of the limitations contained in it. They knew therefore that the agent had authority to make and indorse the paper only while acting in the business of his principal; and that if done for the benefit of D. Rogers & Son or in the business and for the benefit of others, Pexcel Fowler would not be bound. This the plaintiffs saw upon the face of the power; and it was their own folly therefore if they took the notes without first inquiring into the circumstances under which they were made, or neglected to ascertain the truth of the transaction between the attorney and D. Rogers & Son by means of which the paper came into their hands. Had the plaintiffs gone into the inquiry in respect to which they were thus admonished by the terms of the power, they would have learnt at once that the attorney had far exceeded his authority, and that he together with D. Rogers & Son were engaged in the perpetration of a gross fraud upon the principal . . . . It is said however that the attorney, by making and putting the notes into circulation, virtually affirmed they were made in the course of the business of his principal, and hence within the scope of the power. But, is it possible that the agent, by his own acts or declarations, can enlarge the power beyond that defined and limited in his letter of instructions? that he can thus virtually make himself a general, instead of a special

agent, in despite of his principal? Are not all persons dealing with him bound to look to the letter of instructions, to the written authority conferred, for the purpose of determining the extent of it? The argument goes the unreasonable length of saying, in effect, that however distinct may be the limitation of authority, still no person dealing with the agent is bound thereby, provided his acts be of such a description as might possibly come within it; that the party dealing with him is not bound to inquire and ascertain if the agent is in fact acting within the limitation, but shall be protected if it be simply shewn that he appears to be so acting, whatever the fact may be. That is, if the principal has empowered him to make and indorse notes in the course of transacting his business, the agent may make and indorse them in the business of any one; that he may do this for the purpose of paying the debts of his (the agent's) bankrupt house, or may loan the securities for the benefit and accommodation of his bankrupt neighbours. I admit, that not only the acts, but the declarations and representations of the agent, are binding upon the principal while acting within the scope of his authority; but I cannot agree that either can enlarge or add to the authority."

Giving the case the best consideration I can, I feel myself bound to hold that the four defendants other than Burnand are not responsible on the policy sued upon.

I have now only to deal with the defendant Burnand. That he is liable in this action I have no doubt. It was said that the directors of Gaze & Sons had borrowed beyond the company's borrowing powers, and that, therefore, the company were not legally compellable to pay the debt to the plaintiffs; and it was argued that, Gaze & Sons not being legally compellable to pay, Burnand could not be liable. I do not know whether it is true that the borrowing powers had been exceeded. But even if it is true, I do not think it matters. For a good consideration Burnand promised to pay if for any reason Gaze & Sons did not do so. Gaze & Sons did not pay. Therefore Burnand must do so. There will be judgment against Burnand for 250*l.* and interest, with costs; and judgment for the other four defendants with costs, the plaintiffs to have costs against

1903

HAMBRO v. BURNAND.

all the defendants of the issue as to whether the guarantee was Lloyd's business.

Judgment for the plaintiffs against the defendant Burnand; and judgment for the other defendants.

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for Burnand: *Swann, Bradley & Co.*
Solicitors for Draffen: *Merriman, Pike & Merriman.*
Solicitor for Read: *R. A. Read, jun.*
Solicitors for Mordan: *Ward, Bowie & Co.*
Solicitors for Elwell: *Church, Rendell & Co., for J. B. Clarke & Co., Birmingham.*

J. F. C.

1903
July 10.

LOCKWOOD *v.* COOPER.

Gaming—Whist—Absence of Element of Wagering—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

To constitute gaming the game played must be one which involves the element of wagering; each player must have a chance of losing as well as of winning.

A number of persons hired a room in an hotel for the purpose of playing whist. They played for prizes, which were not subscribed for by the players, but were given by third persons:—

Held, that the whist so played did not amount to gaming within the meaning of s. 17 of the Licensing Act, 1872.

CASE stated by justices of the East Riding of Yorkshire.

The appellant, who was the licensed occupier of the Crescent Hotel at Filey, was summoned under s. 17 of the Licensing Act, 1872, for having on February 24, 1903, suffered gaming to be carried on on his licensed premises. (1)

Upon the hearing of the information the following facts were proved or admitted:—

A large room in the Crescent Hotel was engaged by a party of ladies and gentlemen of good social position in the neigh-

(1) By s. 17 of the Licensing Act, 1872, "If any licensed person (1.) suffers any gaming or any unlawful game to be carried on on his premises" he shall be liable to a penalty.

bourhood of Filey calling themselves the Filey Indoor Games Club. The members of this club and their friends met in this room for the purpose of playing a game of cards known as "a whist drive" or "progressive whist," and had the exclusive use of the room, and were charged weekly for the use. A fee of 5*s.* was paid for membership of the club, and each person paid 1*s.* 6*d.* a night when playing towards the cost of the room. Any member could introduce a friend by submitting the person's name for approval and paying 1*s.* 6*d.* for the person so introduced. On the night of February 24, 1903, forty or fifty ladies and gentleman, the majority of whom were members of the club, were playing a whist drive in the said room on the appellant's licensed premises. They were playing for prizes which were won and taken by the winners of the game. The prizes were not subscribed for by the players, but were given for the purpose of being played for by some of the members of the club or by their friends who were not members. It was a rule that no person should win the prize which he or she had given. The appellant knew that a whist drive was being played. He let the room for the purpose. When the parties went to him to take the room they said they would not play either for money or money's worth, and the room was let by the appellant on the distinct understanding that the players should not stake money or money's worth. He knew, however, that they had some presents to give away to those who made the highest points at the game. It was contended on behalf of the appellant that the playing in question was not gaming within the meaning of the section. The justices overruled the contention, and convicted the appellant subject to a case for the opinion of the Court.

Danckwerts, *K.C.*, and *Stutfield*, for the appellant. To constitute gaming there must be an element of wagering; the players must themselves stake money or money's worth upon the game; they must all stand to win or lose. Here, though the players might win they could not lose, for the prizes were not subscribed for by themselves. In *Reg.* v. *Ashton* (1) it was

(1) (1852) 1 E. & B. 286.

1903

LOCKWOOD v. COOPER.

suggested by Lord Campbell that merely playing at a game, such as dominoes, without staking any money on it, would not be gaming within the Alehouse Act, 1828. "The object," he said, "of the statute was to prevent the contracting of bad habits by the practice of games, where money was staked, in public-houses; if money were staked, that would be gaming."

Lush, K.C., and *Cautley*, for the respondent. It may be that the whist played under the circumstances of the present case would not be gaming within the meaning of the Gaming Act, 1845 (8 & 9 Vict. c. 109), but a wider meaning ought to be given to that term in the Licensing Acts. The objects of the two statutes are different. The passage cited from Lord Campbell's judgment in *Reg.* v. *Ashton* (1) suggests that what the Legislature in the Licensing Acts had in view was that the playing of games for money in public-houses was likely to lead to habits of intoxication. And Wills J. in *Dyson* v. *Mason* (2) took the same view, where he said: "There are very good reasons for not allowing gaming to be carried on upon licensed premises. If games, whether of chance or skill, are allowed to be played for money, the tendency is to encourage the spending of money in drink. It is perfectly reasonable that the Legislature should interfere to prevent that being done which is a certain encouragement to drinking." But where a game is played for money in a public-house the encouragement which it gives to drinking is just the same whether the money played for is offered as a prize by third persons, or is staked by the players themselves. And if it be gaming to play in a public-house for a prize given in money by third persons, it must equally be gaming where the prize given is money's worth.

LORD ALVERSTONE C.J. If there were any ground in this case for supposing that there was a colourable arrangement between the members of the club that they should take it in turns to abstain from playing and to give the prizes, so that in substance the players would really be contributing to the prizes that they played for, different considerations would arise. But

(1) 1 E. & B. 286. (2) (1889) 22 Q. B. D. 351, at p. 356.

1903 ·

LOCKWOOD v. COOPER.

Lord Alverstone C.J.

that is not the case here. The justices have found as a fact that the prizes were not subscribed for by the players, by which they must be understood to have meant that the parties were acting in perfect good faith, and were not endeavouring to evade the statute. The question which the justices have asked is whether playing at whist, not for money but for prizes, those prizes being given by third persons, amounts to gaming within the meaning of s. 17 of the Licensing Act, 1872. I am of opinion that it does not. To amount to gaming the game played must involve the element of wagering—that is to say, each of the players must have a chance of losing as well as of winning. To hold otherwise would be an unjustifiable straining of the Act. The appeal must be allowed.

WILLS and CHANNELL JJ. concurred.

Conviction quashed.

Solicitor for appellant: *T. H. Hiscott, for Tasker Hart, Scarborough.*

Solicitors for respondent: *Bockett, Stunt & Nash, for Procter, Scarborough.*

J. F. C.

1903
July 9, 17.

THE KING *v.* PARKE.

Contempt of Court—Publication tending to prejudice Fair Trial—Cause not yet pending in High Court—Jurisdiction of High Court to attach.

Where, a person having been charged before the petty sessions with an indictable offence triable only at the assizes, matter is published in a newspaper tending to interfere with the fair trial of the charge, the High Court has jurisdiction to attach the publisher of such matter for contempt of Court, notwithstanding that at the time of the publication the person charged had not yet been committed for trial.

RULE to attach for contempt of Court.

On March 18, 1903, one S. H. Dougal was arrested on a charge of forgery. He was brought before the petty sessions at Saffron Walden upon the said charge upon March 19, and remanded for eight days.

The defendant, Ernest Parke, was the editor of the *Star* newspaper. In the issues of the said newspaper upon the 19th, 20th, 21st, 23rd, 24th, 26th, and 27th days of March there were published statements with respect to the past life of the said S. H. Dougal tending to prejudice him upon his trial.

A rule having been obtained in the High Court calling upon the defendant Parke to shew cause why a writ of attachment should not issue against him for contempt of Court in publishing the said statements in his newspaper,

Danckwerts, K.C., and *C. W. Mathews*, shewed cause. The Court has no jurisdiction to attach for a contempt of any Court other than itself. It has long been held that the Court of King's Bench will not interpose to punish a contempt of the inferior jurisdiction of the justices: *Rex* v. *Burchett* (1); *In the Matter of an Application for an Attachment for Contempt of Court.* (2) It has even been held that the King's Bench Division has no jurisdiction to attach for a contempt of the Central Criminal Court: *Gordon* v. *Jones.* (3) Having regard to the fact that the judges sitting at the Central Criminal

(1) (1722) 1 Str. 567. (2) (1886) 2 Times L. R. 351.
(3) *Law Journal*, Jan. 4, 1896.

Court now sit under commissions of oyer and terminer and general gaol delivery in like manner as do the judges of assize, that case is an authority that the King's Bench Division cannot commit for a contempt of the Assize Court; and here the charge would necessarily have to be tried at the assizes. It is true that by virtue of ss. 16 and 29 of the Judicature Act, 1873, the jurisdiction of the Courts created by those commissions is transferred to the High Court, and the commissioners sitting under them are to be "deemed to constitute a Court of the said High Court of Justice," but one branch of the High Court has no jurisdiction to commit for contempt of another branch of the High Court: *Cook* v. *Cook*. (1) Assuming, however, that for the purposes of this jurisdiction the different branches of the High Court are to be treated as one Court, still there must, in order to entitle the Court to interfere, be a cause or matter pending before the Court itself. Here there was no cause pending before the High Court at the time of the publication complained of. No bill of indictment against Dougal had then been found. He had not even been committed for trial. The matter was still in the preliminary stage of inquiry before the justices, and it was not then absolutely certain that he would ever be committed at all.

[CHANNELL J. When it is said in the books that there must be a matter pending before the Court, does that expression mean anything more than that the matter must not be yet finished and disposed of?]

No; it means that there must be a matter sub judice in the High Court; and before committal the only Court where the case is pending is the justices' Court. The proper remedy in such a case as this is not an application for attachment for contempt of Court, but a proceeding by criminal information or indictment for interference with the administration of justice.

Lush, K.C., and *Randolph*, in support of the rule. The Court has jurisdiction. The defendant must go the length of contending that the Court has no power to attach for a publication of this kind, though it is known at the time of the publication that the case must be tried in the High Court. In

(1) (1885) 2 Times L. R. 10.

1903

REX v. PARKE.

the cases cited by the defendant the question whether the jurisdiction was confined to cases already pending before the High Court, in the sense that the prisoner had already been committed to take his trial there, was not raised. In *Reg.* v. *Armstrong* (1), where a person was charged before a metropolitan police court with murder, and while the matter was pending in the police court a paragraph was published in a newspaper tending to prejudice the fair trial of the charge, an application for attachment against the publisher was allowed to drop upon his making a full retractation and paying costs; but Wright J. said that he should hesitate long before holding that in such a case there was no remedy by such an application. In *Onslow's and Whalley's Case* (2) Cockburn C.J. said: "It is clear that this Court has always held that comments made on a criminal trial or other proceedings, when pending, is an offence against the administration of justice and a contempt of the authority of this Court. It can make no difference in principle whether those comments are made in writing or in speeches at public assemblies. Neither can it make any difference in principle whether they are made with reference to a trial actually commenced and going on, or with reference to a trial which is about to take place; we can have no hesitation in applying to the one the same rule which we should apply to the other."

Further, a criminal proceeding is pending in the High Court if a person is charged before the magistrates with an offence which is triable only at the assizes, notwithstanding that the person charged is still under remand and no committal has yet taken place. In *Reg.* v. *Payne* (3), where some of the publications complained of were made while the person charged was under remand and others after his committal to the assizes, Lord Russell C.J., who evidently had the question of the proceedings being pending present to his mind, drew no distinction between the two classes of publications.

Danckwerts, K.C., in reply. In *Onslow's and Whalley's Case* (2), at the time of the publication a true bill had been

(1) *The Times*, May 9, 1894. (2) (1873) L. R. 9 Q. B. 219.
(3) [1896] 1 Q. B. 577.

found, and the indictment had been removed into the Queen's Bench, and a day had been fixed for the trial. It was on that ground that the Court held that the case was pending, and that they consequently had jurisdiction to attach. The only point of law there taken by Sir John Karslake for the defendants was whether the indictments could be said to be pending, the trial not having yet commenced. And it was with reference to that contention that Cockburn C.J. expressed himself as he did. That case is really an authority in the present defendant's favour.

1903

REX v. PARKE.

Cur. adv. vult.

July 17. The judgment of the Court (Lord Alverstone C.J., Wills and Channell JJ.) was read by

WILLS J. One Samuel Herbert Dougal was on March 19 brought up before the Saffron Walden Petty Sessions charged with forgery, and remanded without any evidence being taken. He was again brought up on April 2, and remanded after some evidence till April 8. Articles appeared in the *Star* newspaper, of which the defendant is the editor, on March 19, 20, 21, 23, 24, 26, and 27, some of which contained statements undoubtedly very much to the disadvantage of Dougal. To take one instance only, in the issue of March 20, before any evidence had been given in the case, it was stated that on January 27 an affiliation order had been made against him, that a remarkable story of immorality had been disclosed, that he had admitted a conviction for forgery in December, 1895, and that he had been sentenced to twelve months' imprisonment with hard labour. It is unnecessary to go through the various articles complained of, but they were unquestionably calculated to produce the impression that, apart from the charges then under inquiry, he was a man of bad and dissolute character.

On April 7 the rule now under consideration was granted by this Court calling upon the defendant to shew cause why he should not be committed for contempt of Court.

After many subsequent hearings Dougal was committed for trial to the assizes for the county of Essex on the charges of forgery and murder. True bills were found in respect of all

1903.

REX v. PARKE.

Wills J.

the charges. The only indictment actually tried was for murder, and as the prisoner was convicted upon that charge the others were not proceeded with.

The important question has been raised whether the High Court has jurisdiction in such a case, and it has been argued by Mr. Danckwerts on behalf of the defendant that there can be no such jurisdiction because at the time of the publication of the articles complained of there were no proceedings actually pending in any Court but the petty sessional Court; that the jurisdiction to punish the publishers of articles of this kind is confined to cases in which at the moment of publication there is some cause actually depending in the High Court; and that the High Court cannot deal by way of attachment for contempt with interferences with the due course of justice in any Court other than itself.

It may be conceded that the jurisdiction to commit for contempt of Court is confined to contempt of the Court exercising the jurisdiction. Upon the wider and more general question, whether this Court will treat in this fashion inroads upon the independence of inferior Courts, we propose to say a few words towards the close of this judgment. As far as the present case is concerned it does not seem to us to arise. By the Judicature Act, 1873, ss. 16 and 29, the Court of a commissioner of assize is made a branch of the High Court. The crime of which Dougal was accused—a forgery cognizable for the purposes of the petty sessional inquiry at Saffron Walden—could not in the regular course of things be tried anywhere but at the assizes for the county of Essex, and therefore if a committal should take place at all it must be to those assizes. It has been argued, however, that publication of articles of the kind in question cannot be treated as a contempt of the Assize Court unless the committal has actually taken place and a bill been found, when only, it is urged, is there a case pending in the Assize Court, and when it is also urged the jurisdiction ought to be exercised by that Court itself.

A moment's consideration, it seems to us, is sufficient to dispose of such a proposition. The reason why the publication of articles like those with which we have to deal is treated as

a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression "contempt of Court." If it be once grasped that such is the nature of the offence, what possible difference can it make whether the particular Court which is thus sought to be deprived of its independence, and its power of effecting the great end for which it is created, be at that moment in session or even actually constituted or not? It is perfectly certain that by law it will and must be constituted, and that when constituted it and it alone can take cognizance of the particular offence which is the subject of the preliminary inquiry. The wrong can hardly be the less because the purpose or the tendency of the act complained of is that the Assize Court never shall have undisturbed power to fulfil its functions satisfactorily. The High Court exists always. To provide beforehand that one of its branches which, although it does not at the moment exist, yet must, both according to immemorial custom, and now also by statutes and rules having the same effect, come into existence, shall be hampered and hindered in the effectual discharge of its duties as soon as it is constituted, if called upon to try a particular case which it is at all events proposed to bring into that Court, is surely an offence against the High Court itself.

Looking, therefore, to the principles upon which this jurisdiction rests, and to the mischief to prevent which it exists, we can have no doubt that it is properly invoked in the present case.

Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the Court. We think undue importance has been

1903

REX v. PARKE.

Wills J.

attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.

We proceed shortly to notice the authorities upon which reliance has been placed, and which we have been able to obtain from the Crown Office. It will be observed that they are almost all of recent date. This is what might be expected. Before the Law of Libel Amendment Act, 1888, the publication of proceedings before magistrates preliminary to a committal to assize or quarter sessions was at least of doubtful legality: see note in the Revised Reports to *Rex* v. *Fisher* (1), from which it appears that doubts had begun to be cast upon the older doctrine as early as 1858. It was considered at least until 1858 that the inevitable tendency of such a publication was to have the case tried, so to speak, in the minds of persons who might be jurors before they came into Court: *Rex* v. *Fisher* (1); *Rex* v. *Lee*. (2) Since that time till after 1888 only one case is recorded in which the publication of such reports or of extraneous matter connected with them has been brought under the notice of the Courts. Modern journalism with its ceaseless thirst for matters which may interest its readers is a thing of very recent growth; and when the publication of the preliminary proceedings was unlawful or of doubtful legality, not only was the occasion wanting for the publication of many things which since that Act have given rise to complaint, but the unlawfulness of the publication of the proceedings themselves was a standing warning to editors and publishers which was not likely to be overlooked. The only old authority that has been cited to us (apart from those which have been spoken of as dealing with cases actually pending in a Court) is *Rex* v. *Burchett* (3), in which it is said that the Court of King's

(1) (1811) 2 Camp. 563; 11 R. R. 799.

(2) (1804) 5 Esp. 123.

(3) 1 Str. 567.

Bench never interferes with contempt of inferior Courts. This case is an authority, so far as it goes, rather upon the question of general jurisdiction of the Court of King's Bench in its character as the superintending authority over inferior Courts than upon the question we are now dealing with; and the circumstances of that case are such that, except for the general proposition stated, it can have little bearing upon any question likely to arise in any other case. We come therefore at once to the somewhat numerous series of cases which have arisen in quite modern times.

The earliest is reported in 2 Times L. R. 351, heard in 1886 before Lord Coleridge C.J. and Hawkins J. Certain persons had been summoned at Bow Street on February 13, 1886, on a charge of inciting to riot. The proceedings were adjourned, and pending the adjournment *Punch* published a woodcut and letterpress headed "Sneaking Sedition." A rule was applied for to call upon the printer and publisher of *Punch* to shew cause why he should not be committed for contempt of Court. The Court of Queen's Bench refused the rule, Lord Coleridge saying (as reported) that he had never heard it even suggested that this Court could imprison a man for "contempt of Court committed in another place"—an obviously incorrect expression, not at all likely to have been used by Lord Coleridge. The case was within the jurisdiction of the Central Criminal Court, and the trial of the persons summoned took place there. The fact that the Central Criminal Court had become, by virtue of the Judicature Act of 1873, ss. 16 and 29, a branch of the High Court was not called to the attention of the Court.

The next case in order of time was *Ex parte Hermann*. The applicant had been brought before the police court at Marlborough Street with a view to her committal to the Central Criminal Court on a charge of murder. The *People* newspaper of April 1, 1894, contained a statement that she had been tried and acquitted in 1890 on a similar charge, and contained a fairly accurate account of what had happened on that occasion, when the Common Serjeant had held that there was no evidence against her. An application to commit the editor

1903

REX v. PARKE.

Wills J.

and publisher of the *People* was heard before Wright and Collins JJ. The question of jurisdiction was raised but not insisted upon, and the matter was allowed to drop on the defendants undertaking to pay the costs of the application. The case is reported only in the newspapers of the day under the name of *Reg.* v. *Armstrong*. (1) We have had the papers in the Crown Office looked up, and the above statement of facts may be relied upon. Mr. Danckwerts has satisfied us that the Central Criminal Court stands upon precisely the same footing, for the present purpose, as the Assize Courts; but that fact does not appear to have been brought to the notice of the Court. Wright J. is reported to have said that, although he could find no case in point, he should hesitate long before coming to the conclusion that this Court had no jurisdiction in such a case.

The next case was in January, 1895, when a rule was made absolute against one Stead and others. One of the defendants was fined, but, as in that instance an indictment had already been removed by certiorari into the Queen's Bench, it has no bearing upon the present discussion: *Reg.* v. *Stead*. (2)

On December 21, 1895, Wills and Wright JJ. refused a rule in respect of comments of a newspaper on a case of one Crane, who had been committed to the Central Criminal Court on the ground of want of jurisdiction. In this case also it was not called to the attention of the Court that the judge at the Central Criminal Court sat under commissions identical with those which constitute the Assize Courts, and it was assumed that they sat under the Act of 1834, by which the Central Criminal Court was established (4 & 5 Will. 4, c. 36), and not under the commissions required by that Act: see *Law Journal* newspaper, January 4, 1896.

The next case, *Reg.* v. *Payne* (3), in April, 1896, when a rule granted against the editor and publisher of the *Huntingdonshire Post* for comments on a case under committal was discharged on the merits, has little relevance, no question having been raised as to the jurisdiction.

(1) *The Times*, May 9, 1894. (2) (1895) 11 Times L. R. 492.
(3) [1896] 1 Q. B. 577.

In May, 1896, a rule was refused on the merits in respect of comments on a case in which two persons named Milson and Flower had been committed to the Central Criminal Court on a charge of murder. No question of jurisdiction was raised.

On January 19, 1897, Wright and Bruce JJ. granted a rule in respect of an article in the *Brecon and Radnor County Times* upon a case of *Rex* v. *Williams and Others*, who stood committed for trial to the assizes. The same judges in the same term allowed the rule to be discharged on the defendants undertaking to pay the costs of the applicant as between solicitor and client. The question of jurisdiction does not seem to have been raised: *Reg.* v. *Felgate.* (1)

On January 26, 1897, a rule was refused by Wright and Bruce JJ. against the same defendants for an article in the same paper. It is not reported, but there can be no doubt that it was refused on the merits and not on any question of jurisdiction.

On April 28, 1899, this Court, then consisting of Lord Russell C.J., Darling and Channell JJ., granted a rule for comments on a case of one Mary Ann Ansell, who had been committed to the Hertfordshire Assizes on a charge of murder. The rule, however, was, for some reason which we cannot trace, not drawn up. Probably, as in the late case of *Rex* v. *Newton* (2), it was supposed to be a matter between the parties only, and was compromised without the leave of the Court.

We are informed that there may have been other cases on the civil side of the Court of which there is no record in the Crown Office. If it is so, they would probably be cases in which comments had been made affecting proceedings in matters pending on the civil side, and if so would afford no assistance in the present discussion.

It will thus be seen that there have been only two cases in which the question of jurisdiction was effectively raised—in each instance with respect to cases which, if tried at all, would have been tried at the Central Criminal Court. In both cases the Court assumed that the Central Criminal Court was a separate and independent Court with which this Court had

(1) Not reported. (2) Not reported.

1903

REX v. PARKE.

WILLS J.

nothing to do. We think that view is erroneous for the reasons given by Mr. Danckwerts and which we adopt. In neither case was there any serious argument on the subject of jurisdiction, and we think, therefore, that very little assistance can be gathered from the string of cases which have just been mentioned, or from the case in 1 Strange.

For what they are worth, they tell rather against than for the general jurisdiction of this Court to protect inferior Courts from attacks of this kind on their independence and usefulness. On the other hand, very serious and important considerations tend the other way. Many inferior tribunals are not Courts of record, and, therefore, have no means of checking practices of the kind with which we are dealing. Many of them sit only at long intervals, and before they can do anything to interfere with such offences against public justice all the mischief possible may have been effectually done. This Court exercises a vigilant watch over the proceedings of inferior Courts, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law. It would seem almost a natural corollary that it should possess correlative powers of guarding them against unlawful attacks and interferences with their independence on the part of others. It is said with respect to them, as has been said with respect to the present case, that there is a remedy by criminal information or indictment. The latter remedy is unsatisfactory on account of the necessary delay, though it has been made use of: *Rex* v. *Fisher* (1), where the defendant had published in a paper called the *Day* a sensational report of the statements made before a magistrate previous to committing a prisoner for trial at the Admiralty Sessions or in the Court of King's Bench, as the parties might think fit. Criminal information is cumbrous, and is also liable to great delay. It has, no doubt, been occasionally resorted to—as in the case of *Rex* v. *Williams* (2), where John Thurtell had been committed to the assizes on a charge of murder, and a theatrical exhibition was held by the Court to be calculated to interfere with

(1) 2 Camp. 563; 11 R. R. 799.
(2) (1823) 2 L. J. (O.S.) K. B. 30; 26 R. R. 624.

the fair trial of his case; in *Rex* v. *Lee* (1), where the defendant had published a statement of the contents of depositions taken before the magistrate on a charge of murder; and in *Rex* v. *Fleet* (2), where the defendant had published the evidence given before a coroner's jury with comments unfavourable to a party accused of murder: see also *Reg.* v. *Gray* (3), an important Irish case. In England no case of a criminal information for a matter of this kind is to be found in the books since *Rex* v. *Williams* (4), cited above, in 1823. There are, however, serious objections to the proceedings by way of criminal information. Apart from those which have been pointed out before, it is usual in cases of criminal information for the Court to be satisfied that the applicant is a person to whom the privilege of filing an information in the name of the Attorney-General may safely and properly be granted, and although this condition has been dispensed with in the cases above mentioned, the Court ought to be chary of departing from so wholesome a rule.

On the other hand, there are not wanting expressions in the books which point in the other direction. The jurisdiction, as has been shewn, has been actually exercised, whether per incuriam, or rightly, in several of the cases cited. The Court of King's Bench is one to which every criminal case which may be the subject of indictment is liable, upon proper materials, to be removed. One frequent ground of removal is that prejudice exists in the natural locality of trial, and it may well be that it has a direct interest and duty in repressing practices the influence of which for evil would extend, though perhaps in a less measure, to itself should it be called upon to try a case removed from another Court. But we purposely abstain from pronouncing any opinion upon this general question, and prefer to leave it entirely open when the occasion shall arise, and at the present moment confine ourselves to saying with Wright J. that we should hesitate long before casting any more doubt than may already exist upon the capacity of this

(1) 5 Esp. 123.
(2) (1818) 1 B. & A. 379; 19 R. R. 344.
(3) (1865) 10 Cox, 184.
(4) 2 L. J. (O.S.) K. B. 30; 26 R. R. 624.

1903

REX v. PARKE.

Wills J.

Court to deal by proceedings for contempt with cases in which attempts are made to pollute the stream of justice, and to interfere with its proper and unfettered administration by Courts which possess no adequate means of protecting themselves in this respect.

In the particular instance before us it appears that Mr. Parke was not himself the author of the articles complained of, nor was he aware that they had been written or were about to be published. His superintendence, however, must have been of a very lax and perfunctory character, as the articles were published in no less than seven issues of his paper, extending from the 19th to the 27th of March, both days inclusive; and as the first of the series was one which grossly transcended all possible limits of propriety in such matters, and transcended them in a peculiarly mischievous fashion by stating a number of facts extremely damaging to the prisoner which could never be given in evidence against him on his trial, and upon the publication of which any reasonable sense of justice would have induced the editor to administer serious reproof to his subordinates, he cannot be acquitted of great negligence in allowing such violations of the law to be repeated time after time, and we think he ought to pay a substantial fine, which we fix at 50*l.*; and our order is that he pay that sum as fine, and that he be imprisoned in the custody of the Court, and, if necessary, in Brixton gaol, until the fine be paid. We make no order as to costs, as, looking to the matters brought to our notice in the application recently heard against the solicitor who took the present proceedings, we can hardly doubt that the real object of the motion was to obtain for Dougal a sum of money by way of compromise—an abuse of the process of this Court to which we feel bound to put a stop.

Rule absolute.

Solicitor for complainant: *Arthur J. E. Newton.*
Solicitors for defendant: *Lewis & Lewis.*

J. F. C.

FERRAND, Appellant; BINGLEY URBAN DISTRICT COUNCIL, Respondents.

1903
July 1, 2.

Highway—Exemption from Rate—Liability to repair Ratione Tenuræ—Proof of Exemption from Liability to contribute to Repair of other Highways—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33.

The existence of a liability ratione tenuræ to repair a certain highway does not of itself shew that there is an exemption from liability to contribute to the repairs of other highways in the same highway district; there must be other evidence that the exemption exists in order to prove a legal exemption within s. 33 of the Highway Act, 1835, which provides that, when property, or the owner or occupier in respect thereof, has, prior to the passing of the Act, been "legally exempt" from payment of highway rate, that property and the owners and occupiers thereof shall be exempt from payment of the highway rate thereby imposed.

Case stated by the Court of quarter sessions for the West Riding of the county of York.

The following material facts were stated in the case:—

The hamlet of Harden was, previous to 1862, a separate highway parish, and within it was a highway known as the Harden and Cullingworth Road. There were within that parish other highways which were, and always had been, repairable by the inhabitants at large. The portion of the highway in question within the actual village of Harden was always repaired by the inhabitants at large. The hamlet of Harden subsequently became part of the Bingley urban district. Ferrand was the owner, but not the occupier, of land along one side of the highway called the Harden and Cullingworth Road, in the village of Harden, which land was acquired by his predecessors in comparatively recent times. He was also the owner of the land on both sides of the same highway outside the village, and occupied a part of that land; the whole of that land had been owned, and part had been occupied, by him or his predecessors continuously since before 1731. He also owned other lands within the district of the Bingley Urban

1903

FERRAND v. BINGLEY URBAN COUNCIL.

District Council, partly occupied by himself and partly by his tenants.

In November, 1902, the district council duly made and levied a general district rate of 2*s.* 2*d.* in the pound, under ss. 210 and 211 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which properly included the cost of repairs of highways within their district. Ferrand appealed against the rate upon the ground that his property in respect of which the rate was made, and the owners and occupiers in respect thereof, had, previous to the passing of the Highway Act, 1835, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof or of highway rate, by reason that the owners and occupiers had been liable to repair, and had repaired, ratione tenuræ the highway in question, and were therefore exempt from payment of so much of the rate as was made to defray the cost of repair of highways in the district.

There was no evidence whether before 1835 the owners and occupiers had performed statute duty, or paid composition in lieu thereof, or paid highway rates, the books relating to rates from 1835 to 1862 having been lost, and there was no other evidence whether they had paid highway rates or not. From 1862 to 1902 they had paid highway rates or general district rates.

The justices found as a fact that Ferrand and his predecessors in title, or their tenants, had from time immemorial repaired the highway in question, outside of the village of Harden, and had done so ratione tenuræ.

Ferrand contended that he was entitled to the exemption claimed by virtue of s. 33 of the Highway Act, 1835 (1); that the part of the general district rate which was made to defray the cost of repair of highways could be dealt with separately from the rest of the rate; and that the exemption extended to

(1) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 33: "When property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners and occupiers thereof shall be exempt from the payment of the rate hereby imposed."

all his land within the old highway parish of Harden. The district council contended that the repair of the highway in question from time immemorial did not create an exemption within s. 33 of the Highway Act, 1835; that the exemption contained in s. 33 did not apply to any part of a general district rate; that the onus was on Ferrand to prove to what particular lands the alleged exemption attached; and that in no case could the exemption extend to any lands outside the old highway parish of Harden.

The Court of quarter sessions held that the lands which were liable to the repair of the highway in question were exempt from that part of the general district rate which was attributable to the repair of highways, and they allowed the appeal. The question for the opinion of the Court was whether the appeal was rightly allowed.

Macmorran, K.C., and *J. Scholefield*, for the district council. The liability to repair ratione tenuræ, or by reason of the ownership or occupation of certain land, does not necessarily carry with it any exemption from liability to contribute to the repairs of other highways; the exemption must be proved by evidence: *Reg.* v. *Rollett.* (1) In *Reg.* v. *Heath* (2), *Heath* v. *Weaverham Overseers* (3), and *Dalton Overseers* v. *North Eastern Ry. Co.* (4) the exemption was not disputed. The liability might arise from an agreement between the inhabitants that certain lands should be liable for the repair of a certain highway, and should in consideration of that liability be exempt from contributing to the repair of other highways: *Reg.* v. *Browne* (5); or the liability might arise from a grant of the lands subject to the condition of repairing a certain highway: *Esher Urban Council* v. *Marks* (6); in which case there would be no reason for assuming any exemption from contributing to the repair of other highways; or the liability might have arisen ratione clausuræ, in which case there would be no exemption. In the present case there was no evidence at all that there ever was any exemption, and the exemption cannot

(1) (1875) L. R. 10 Q. B. 469.
(2) (1866) L. R. 1 Q. B. 218.
(3) [1894] 2 Q. B. 108.
(4) [1900] A. C. 345.
(5) (1849) 13 Q. B. 654.
(6) (1902) 71 L. J. (K.B.) 309.

1903

FERRAND v. BINGLEY URBAN COUNCIL.

be inferred from the mere fact of liability to repair a certain highway.

The exemption, if it exists, must be in respect of certain lands. Ferrand was the owner and occupier of many different hereditaments within the old parish, and no evidence was given as to the particular lands in respect of which the liability to repair existed.

Assuming that there was an exemption from highway rates under s. 33 of the Highway Act, 1835, yet that exemption does not extend to a general district rate made in an urban district under the Public Health Act, 1875 : *Dyson* v. *Greetland Local Board*. (1) In *Reg.* v. *Heath* (2) the only point decided was as to the poor-rate, in which the amount charged for repair of highways was separable ; and in *Dalton Overseers* v. *North Eastern Ry. Co.* (3) the question turned upon s. 35 of the Highway Act, 1862 (25 & 26 Vict. c. 61).

A. T. Lawrence, K.C., and *T. R. D. Wright*, for Ferrand. The liability to repair a particular highway by reason of the tenure of certain lands carries with it an exemption from liability to contribute to the repair of other highways, and all the cases treat liability and exemption as being correlative. The liability to repair ratione tenuræ generally arose by reason of an arrangement whereby the owners of estates agreed to repair certain roads and the parish the other roads. There must always be some benefit in return for the liability, and that benefit is usually exemption from liability to contribute to the repair of other roads. In *Heath* v. *Weaverham Overseers* (4) Charles J. treated the liability and exemption as correlative ; he said : "Inasmuch as it was proved that the appellants prior to the Highway Act, 1835, did repair and were liable ratione tenuræ to repair this road, there is no doubt that the premises were prior to that date legally exempt" ; and it was held that when the liability ceases the exemption also ceases. There is no case to be found in which there was a liability without exemption, but there are many cases in which exemption is treated as necessarily accompanying liability : *Rex*

(1) (1884) 13 Q. B. D. 946.
(2) L. R. 1 Q. B. 218.
(3) [1900] A. C. 345.
(4) [1894] 2 Q. B. 108, 112.

v. *Ecclesfield* (1); *Freeman* v. *Read* (2); *Great Western Ry. Co.* v. *Denchworth.* (3)

Macmorran, K.C., replied.

LORD ALVERSTONE C.J. This appeal must be allowed upon the ground that the conditions of exemption in s. 33 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), are not fulfilled. That Act provides that when any property has, previous to the Act, been legally exempt from statute duty or payment of any composition or of highway rate, that property shall be exempt from payment of the rate thereby imposed. For the purpose of this case I will deal with the matter as if this rate were a highway rate pure and simple. I express no opinion upon the argument that the rate in question was a general district rate, and I will only say that I am not at present prepared to accede to the contention of the district council. It has been contended by Mr. Lawrence that whenever there is a liability to repair any piece of road ratione tenuræ, the necessary consequence is an exemption from payment of highway rate. If that is the true view of the consequences of liability to repair ratione tenuræ, the contention of the present respondent is well founded. I think that contention fails, because it assumes that it is sufficient to shew a liability to repair ratione tenuræ without also proving either non-payment of highway rate or other circumstances which shew an exemption from liability to pay it. The result of the decisions seems to be that in all those cases there was such non-payment of rate, or such a state of circumstances shewing exemption in fact, that it was necessary only to consider whether the exemption could be a "legal" exemption.

In *Freeman* v. *Read* (2) Wightman J. said: "There was evidence that from all time Walcot was a tything, and that the parish of Swindon had never compelled the inhabitants of the tything to contribute to the repair of highways within the parish; also that the parish of Swindon never contributed to the repair of the highways within the tything, and whatever

(1) (1818) 1 B. & Ald. 348; 19 R. R. 335.

(2) (1863) 4 B. & S. 174, 185.

(3) (1861) 25 J. P. 342.

1903

FERRAND v. BINGLEY URBAN COUNCIL.

Lord Alverstone C.J.

repairs were done to the highways within the tything were done by the inhabitants of the tything: either of these facts by itself would not be sufficient, but taken together they shew exemption of the inhabitants of the tything from liability to repair the highways within the parish, and a good consideration for that exemption." That is of course only an illustration; but it seems to me, remembering that the matter to be considered was the liability of the inhabitants, that it is important to observe that in all the cases the decision has been founded on the fact that there was no evidence of any payment or of any contribution to the expenses of the repair of other roads. In *Reg.* v. *Heath* (1) there is a statement in the case that "from time immemorial the owners and occupiers of . . . . have been exempt from repairing or contributing to the repairs of other highways in the hamlet." And in the later case of *Heath* v. *Weaverham Overseers* (2) Charles J. says: "What is the meaning of the words 'legally exempt'? Clearly the exemption must be a legal one; and it has been decided that, although the mere omission to rate premises is not sufficient evidence of exemption, yet the circumstance that the occupiers have always repaired a particular road is enough to establish a 'legal' exemption." He there obviously assumes that there was in fact non-payment of any rate; and in my opinion that the foundation of the claim for exemption in that case was the fact that there had been no payment. It is not necessary to say more than that in all the cases the argument proceeded on the basis of justifying the circumstance of non-payment, the question which the Court had to consider being whether there was a "legal" exemption.

In order, therefore, to establish an exemption there must be facts which shew that there has not been any contribution to the repairs of highways. In the present case the statement is that there was no evidence whether or not before 1835 the owners or occupiers had performed statute duty or paid a composition in lieu thereof or paid highway rates; and that there was no evidence one way or the other as to the period from 1835 to 1862, the books having been lost. It is quite impos-

(1) L. R. 1 Q. B. 218. (2) [1894] 2 Q. B. 108.

sible upon that statement to come to the conclusion that there was any evidence of an exemption based upon legal grounds. There is no authority to be found that liability to repair ratione tenuræ is necessarily accompanied by exemption. This appeal must, therefore, be allowed upon the ground that there is no sufficient evidence to justify the conclusion that there was any legal exemption within s. 33 of the Highway Act, 1835.

WILLS J. Our decision seems to me to rest upon the proper application to the circumstances of this case of the wide principle that where a state of things is found to have existed as far back as evidence can shew, a legal origin ought to be presumed if possible for the state of things which exists. It appears to me that in the nature of the obligation to repair ratione tenuræ there is nothing to imply that it cannot exist without exemption. In the strict sense of the term the liability ratione tenuræ, unless arising from a grant by the Crown, must have its origin in a grant before the statute Quia Emptores; and, if the facts are such as to justify the presumption, we are bound to make it. In that case there is no reason to suppose any corresponding exemption, because the grant of lands might well be made upon the condition of repairing a highway without any other benefit. On the other hand, there is no difficulty in assuming an agreement between all parties subject to the general parochial liability to repair the highways that, in consideration of a grant by one of them of land on the terms of repairing a particular highway, the land should be free from any general liability to contribute to the repair of other highways. Therefore there is no difficulty in presuming either a liability without any exemption or a liability with exemption. The only way of deciding which presumption ought to prevail is to see whether there is any evidence of non-contribution or non-payment. There is no satisfactory evidence of that kind in the present case, and I think that the natural presumption is that the circumstances were the same before 1862 as after. In my opinion there is nothing to rebut the presumption that the state of things was a grant of lands with a liability to repair ratione

1903

FERRAND v. BINGLEY URBAN COUNCIL.

Wills J.

tenuræ but without any exemption. There is nothing to shew that there ever was any exemption in fact. I think, therefore, that the case is not within s. 33. I doubt whether there is really any case in which the liability is not strictly ratione tenuræ. The case of *Esher Urban Council* v. *Marks* (1) has been referred to as inconsistent with such a proposition. I do not agree. There, upon an inquisition of ad quod damnum executed in 1773, the jury found that it would not be to the prejudice of the King or any other if a licence were granted by the King to the owner of land over which a highway passed to stop up the highway and to hold the soil thereof to himself and his heirs for ever so that he set out another specified highway, such road to be thereafter for ever maintained and repaired by him and his heirs. According to all ordinary presumptions, the soil of the stopped up highway was already in the owner of the lands through which it passed; and if that were so, and no other state of things were presumed, the grant of the soil by the King would be inoperative, and no service could be thereby created. But there seems to be no legal difficulty in the way of presuming either that the soil of the highway was in the Crown, or that, as a part of the bargain by which the licence of the Crown to stop up the highway was to be given, the soil of the highway was surrendered to the Crown and regranted with the service attached—in either of which cases the liability would be strictly one arising out of tenure. In my opinion the evidence necessary to support the presumption of a liability accompanied by exemption is entirely wanting in this case, and we must therefore presume a liability of the other kind, that is, without any exemption.

CHANNELL J. I entirely agree. The mere fact of liability to repair ratione tenuræ is not of itself sufficient to shew that there is an exemption from contributing to the repairs of other highways. If it is shewn that in fact there has been non-contribution, that is at once accounted for by the liability to repair a particular highway, and is taken to be a legal exemption and not a mere omission. The evidence in this case is that for

(1) 71 L. J. (K.B.) 309.

the last forty years payment of highway and general district rates has been made.

1903

FERRAND v. BINGLEY URBAN COUNCIL.

Appeal allowed.

Solicitors for Ferrand: *Patersons, Snow & Co., for Mossman, Atkinson & Blankley, Bradford.*

Solicitors for district council: *Church, Adams & Prior, for A. & M. W. Platts, Bingley.*

W. A.

KESLAKE, APPELLANT *v.* BOARD OF TRADE, RESPONDENTS.

1903
June 30.

Ship — Seaman — Desertion — Forfeiture of Wages — Deduction by Consent — Payment through or in presence of Superintendent—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 131, 221, 282.

A seaman deserted from a ship at a foreign port, thereby committing an offence under s. 221 of the Merchant Shipping Act, 1894, which rendered him liable to forfeit his wages then due and subsequently earned, and to satisfy any excess of wages paid by the owners to a substitute at a higher rate. The seaman returned to the United Kingdom in another ship of which the appellant was master. In order to escape a prosecution for desertion by the owners of the first ship, the seaman agreed to have deducted from the wages earned on the homeward voyage the extra expense which had been incurred by them in providing a substitute after his desertion. The superintendent of mercantile marine before whom the seaman was being discharged refused to be present at the payment of the wages on the ground that the deduction was illegally made. The balance due to the seaman after making the deduction was paid to him by the appellant in the absence of the superintendent. The appellant was summoned under s. 131 of the Merchant Shipping Act, 1894, for having paid the wages otherwise than "through or in the presence of the superintendent," and was convicted:—

Held, that the conviction was right; that there is no power to make a deduction from a seaman's wages on the ground of forfeiture after desertion, although with the consent of the seaman, except under an order of a Court of competent jurisdiction.

CASE stated by a metropolitan police magistrate sitting at the Thames Police Court.

An information was laid by the respondents against the appellant, the master of the foreign-going British steamship *Urmston Grange*, for that the appellant did on December 11,

1903

KESLAKE v. BOARD OF TRADE.

1902, at the Mercantile Marine Office, 133, East India Dock Road, Poplar, E., unlawfully pay the wages of Charles Mellen, late fireman of that steamship, otherwise than through or in the presence of the superintendent of mercantile marine, contrary to s. 131 of the Merchant Shipping Act, 1894.

The facts as found by the magistrate were as follows: Charles Mellen mentioned in the information signed an agreement as provided by s. 115 of the Merchant Shipping Act, 1894, to serve as a fireman on board the foreign-going British steamship *Saxony*, owned by D. MacIvor, Sons & Co., of Liverpool, on June 14, 1902, for a voyage from Liverpool to the River Plate and back, for a period not exceeding twelve months, at the rate of 4*l.* per month wages. Mellen received an advance of 3*l.* 10*s.* On July 15, 1902, on the arrival of the *Saxony* at Buenos Ayres, in the River Plate, and before she sailed thence, Mellen went ashore and deserted the *Saxony*, and failed to serve on board during her passage from Buenos Ayres to Liverpool. In consequence of Mellen's breach of agreement the master of the *Saxony* was compelled to engage a fireman as substitute at the rate of 4*l.* 10*s.* per month, which was the rate then prevailing at the port. By reason of the breach of agreement the owners of the *Saxony* incurred a loss of 15*s.* 3*d.* On October 21, 1902, Mellen signed an agreement at Buenos Ayres as fireman on board the *Urmston Grange* at 4*l.* 10*s.* per month, and on December 7 the *Urmston Grange* arrived at the West India Docks, London. On her arrival the appellant received intimation by means of a letter addressed to him from the office of the Shipping Federation, Limited (of which the owners of the *Saxony* were members), of Mellen's desertion and of the loss which the owners of the *Saxony* had thereby sustained. The letter, so far as is material, was as follows: "Under s. 221 of the Merchant Shipping Act, 1894, the penalty for desertion is forfeiture of wages, due at desertion and subsequently earned, until the deserter returns to the United Kingdom. From such forfeiture the owners of the vessel from which the desertion took place are entitled to be reimbursed the extra expenses incurred by them in hiring a substitute in place of the deserter, and the excess wages, if any, paid to such substitute; the

balance of the forfeiture is payable to the Exchequer. It is the intention of this federation to prosecute, if necessary, in the present instance, with the object of enforcing the penalty provided by law. I have therefore to ask, on behalf of the owners of the *Saxony*, that you will be good enough to withhold payment of the wages earned on your vessel by C. Mellen pending the issue of the proceedings which are contemplated. The amount of the owners' claim is 15*s.* 3*d.*; please give the above named the option of agreeing to one of the two following courses: (*a*) If the balance of wages due exceeds the amount of the owners' claim by 2*l.* or over, give him the opportunity of voluntarily agreeing to the deduction of the claim from such balance of wages. (*b*) If the balance of wages is less than, or does not exceed by more than 2*l.*, the amount of the owners' claim, give him the opportunity of voluntarily agreeing to the deduction of all but 2*l.* from such balance of wages. If the deduction (which is suggested in the interest of the seaman to save the cost and delay of litigation) is agreed to, there will be no need to withhold the balance of wages thereafter remaining; if, on the other hand, it is not agreed to, kindly stop the entire wages as requested above, and let me know the seaman's reasons for refusing to come to a settlement." The letter was read over and thoroughly explained to Mellen, who was a man of fair education and who understood the terms thereof. Mellen then agreed to the sum of 15*s.* 3*d.* being deducted from his wages earned on board the *Urmston Grange*, and signed a form of authority to that effect, which was also read over to him and which he thoroughly understood. In consequence of the said agreement and authority the appellant entered in the account of wages on the form approved by the Board of Trade, under the heading "Other Deductions," the words "Deducted by your authority, 15*s.* 3*d.*," and handed the account to Mellen. On December 11, 1902, the appellant attended at the shipping office for the purpose of paying Mellen and other members of the crew of the *Urmston Grange* in accordance with s. 131 of the Merchant Shipping Act, 1894, and Mellen also attended. The mercantile marine superintendent then read to the appellant s. 221 of the Act, and expressed his view that the

1903

KESLAKE v. BOARD OF TRADE.

deduction of 15*s.* 3*d.* from Mellen's wages was not legally made, and refused to accept the wages with the deduction, or to allow them to be paid to Mellen in his presence. The superintendent having left the office, the appellant in his absence paid Mellen the balance shewn by the account of wages to be due after deducting 15*s.* 3*d.*; and Mellen thereupon signed the account of wages, and also a release upon the ship's articles of agreement.

It was contended on behalf of the respondents that it was not competent for the appellant to deduct the 15*s.* 3*d.* from Mellen's wages, even with his consent, as compensation to the owners of the *Saxony* on account of his desertion from that vessel, for that such deduction could only be made by a Court of summary jurisdiction for a forfeiture of wages on the offence of desertion having been proved according to the true construction of ss. 221 and 232, sub-s. 1, of the Act of 1894.

It was further contended that, before any sum could be deducted from a seaman's wages in respect of desertion, the seaman must be proceeded against summarily; he must be convicted of the offence of desertion; a forfeiture of wages must be decreed by the Court; a quantum of forfeiture of wages as compensation in respect of the desertion must also be decreed. It was also contended that in deducting the sum of 15*s.* 3*d.* the appellant was attempting to usurp the functions of a Court of summary jurisdiction as defined by the Legislature, and that, therefore, the superintendent was right in refusing to accept the wages on behalf of Mellen, or to allow them to be paid to Mellen in his presence, and that, as the appellant paid the wages in the absence of the superintendent, he ought to be convicted of the offence alleged in the information.

It was contended on behalf of the appellant:—

That Mellen by deserting the *Saxony* committed a breach of his agreement with the owners of that vessel, and put them to direct expense amounting to 15*s.* 3*d.*, which, by s. 226 of the Act, they were entitled to recover by civil procedure;

That the owners of the *Saxony* were entitled to compromise their right of action, and did so by the agreement between the appellant acting on their behalf and Mellen;

That the right of the respondents, if any, to take proceedings against Mellen under s. 221 for an offence under the Act was not prejudiced by the agreement;

That a full and true account of the seaman's wages in the form approved by the Board of Trade had been delivered to Mellen as required by the Act;

That the deduction of 15*s.* 3*d.* was a proper and lawful deduction, and not contrary to the Act, and the appellant was ready and willing to pay off Mellen in manner provided by the Act, but was prevented from doing so by the absence of the superintendent, who improperly withdrew his presence.

The magistrate was of opinion that a forfeiture for desertion of any part of a seaman's wages must be determined by a Court of competent jurisdiction in accordance with ss. 221 and 232 of the Act, and that it could not be the subject of private arrangement, and that the deduction of 15*s.* 3*d.* from Mellen's wages was illegal. He therefore convicted the appellant.

The question for the decision of the Court was whether the decision of the magistrate was right in point of law. (1)

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 131, sub-s. 1: "Where a seaman is discharged before a superintendent in the United Kingdom, he shall receive his wages through or in the presence of the superintendent, unless a competent Court otherwise direct, and if in such case the master or owner of a ship pays his wages within the United Kingdom in any other manner, he shall for each offence be liable to a fine not exceeding ten pounds."

Sect. 221: "If a seaman lawfully engaged, or an apprentice to the sea service, commits any of the following offences, he shall be liable to be punished summarily as follows:—

"(*a*) If he deserts from his ship he shall be guilty of the offence of desertion, and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding twelve weeks with or without hard labour."

Sect. 226: "Nothing in the last preceding section or in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the

1903

KESLAKE v. BOARD OF TRADE.

J. A. Hamilton, K.C., and *Lewis Noad*, for the appellant. The decision of the magistrate was wrong. Under s. 221 of the Merchant Shipping Act, 1894, one of the consequences of the offence of desertion is that the seaman is liable to forfeit the wages which he may subsequently earn in another ship and to satisfy the excess of wages paid to any substitute engaged in his place; and by s. 226 the remedies provided by the Act are not to affect any other remedies which may exist in the case of desertion. There is no provision in the Act, either express or implied, that a deduction from wages shall only be made under an order of a Court of summary jurisdiction, and, therefore, the common law right of a master to pay the seaman what he admits to be due after the deduction remains. The transaction in the present case may be regarded as a compromise between the appellant, as agent for the owners of the *Saxony*, and the seaman of the appellant's right to claim compensation for the seaman's breach of contract. There is nothing in the Act making a transaction of that kind illegal. If it be said that the effect of it is to deprive the Exchequer of the balance of the forfeited wages, which under s. 232 have to be paid to the Exchequer, the answer is two-fold—first, in no case is there any obligation on a shipowner to prosecute for desertion, and, in the absence of a prosecution, the Exchequer would get no part of a deserter's wages, and the position would therefore be exactly the same as in the present case; and, secondly, there is nothing in the Act to prevent the Board of Trade from instituting a prosecution for desertion, although a deduction from the seaman's wages has previously been made by agreement with the owners. The deduction in the circumstances of the present case not

---

matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage."

Sect. 232, sub-s. 1: "Where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer, and carried to the Consolidated Fund."

being illegal, it was the duty of the superintendent to have remained present during the payment of the wages, and the appellant did not, by paying them in his absence, commit any offence under s. 131.

Sir Edward Carson, *S.-G.*, *H. Sutton*, and *Howard Smith*, for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. I am of opinion that the decision of the magistrate was right, for the reason which he has given, but I desire to make it plain that my judgment is confined to the facts of the present case. I do not express any opinion one way or the other as to what would be the effect of any other arrangement made under different circumstances. The appellant, the master of the *Urmston Grange*, was summoned for not having paid a seaman his wages in the presence of the superintendent of marine, and if the question is merely as to the payment of wages, and they are paid in any other way than that provided by s. 131 of the Merchant Shipping Act, 1894, it is clear that an offence is committed. In my opinion the words "through or in the presence of the superintendent" in that section are not simply formal words inserted with the object of ensuring that the seaman shall receive the whole sum due to him without any deduction on the part of a crimp or some other person through whose hands the money might otherwise pass; the presence of the superintendent is required for another purpose. Under s. 132 an account of the wages due has to be delivered to the seaman at the time of payment, and any deductions that are going to be made from the wages must appear in that account. In the present case the superintendent would see in the account the words "Deducted by your authority, 15*s.* 3*d.*" That might mean anything. It was in fact a deduction made in pursuance of an agreement or bargain which had been entered into between the appellant and the seaman, the nature of which was no doubt perfectly well understood by the seaman. The question is, What was the practical effect of that bargain? Desertion by seamen and the consequences which it entails are dealt with in ss. 221 and 232

1903

KESLAKE v. BOARD OF TRADE.

Lord Alverstone C.J.

of the Merchant Shipping Act, 1894. [His Lordship read the sections:—]

The effect of those provisions is that, if proceedings had been taken before a magistrate against this seaman for desertion, the claim of the owners of the *Saxony* would have been a first charge upon any money which the seaman might have to forfeit under the order of the magistrate, and any balance would be payable to the Exchequer. It is plain, therefore, to my mind that this particular bargain between the appellant and the seaman was one which purported, not only to give to the appellant on behalf of the owners of the *Saxony* the sum of 15*s.* 3*d.*, but also to place the seaman in a different position with reference to the consequences of his desertion as provided for by ss. 221 and 232. In other words, the bargain dealt with the position of the seaman, as regards his liability to forfeiture of wages by reason of desertion, without the sanction of the Court. The effect of the superintendent being present at the payment of the wages, as shewn by this account, would have been to make him, certainly indirectly, and possibly directly, sanction the deduction of 15*s.* 3*d.* It seems to me that the superintendent was right in saying that he would not be a party to that deduction, and that he must therefore decline to be present when the amount of wages so arrived at was paid. That being so, the payment to the seaman, made on the responsibility of the master and not in the presence of the superintendent, was not such a payment as is provided for by s. 131.

I only desire to add that there is nothing in s. 226 which in any way conflicts with the view which I have expressed. No doubt that section does reserve certain rights and remedies to owners and masters. It is not necessary in the present case to express any opinion as to the extent of those rights or as to the matters to which they apply. I will only say that, in my opinion, s. 226 has no bearing on the transaction or arrangement in the present case which purported to have been carried out under ss. 131, 221, and 232.

For these reasons I think this appeal should be dismissed.

1903

KESLAKE v. BOARD OF TRADE.

WILLS J. I am of the same opinion. I also wish to limit my judgment entirely to the facts of this case, and I express no opinion as to whether under s. 226 an agreement for a deduction from the wages of a seaman who had been guilty of desertion could be lawfully made, provided that there was nothing in the agreement which could be construed into a promise not to prosecute. That question must be decided when it arises. The present case is different, because the letter of the Shipping Federation, upon the faith of which the seaman signed the authority to the appellant to make the deduction from his wages, seems to me to contain the clearest possible intimation to the seaman that, if he signed that authority, the owners of the *Saxony* would not prosecute him for deserting; and as they were the only persons who were likely to prosecute, that consideration would be a strong inducement to the seaman to agree to the deduction, and thus get rid of the risk of criminal proceedings. It is quite true that under s. 232, sub-s. 1, the utmost that the owners of the *Saxony* could get in the event of criminal proceedings would be this sum of 15*s.* 3*d.*, that being the expense caused to them by the desertion; but it is also clear that, if proceedings were taken under s. 221 (*a*), the magistrate might order the whole of the wages to be forfeited; and, therefore, the arrangement come to by the appellant with the seaman was one by which the seaman escaped the liability to criminal proceedings, which might result in a fine or in a forfeiture of the whole of his wages.

I think, therefore, that the superintendent was perfectly justified in refusing to be present when wages were to be paid in pursuance of this arrangement. Sect. 137 of the Act shews that the duties of the superintendent involve much more than a mere mechanical presence during the payment of wages. His functions are of a more important character than that, for he may be called upon to act as arbitrator in disputes between masters and seamen. I think, therefore, that the decision of the magistrate was right.

CHANNELL J. I am of the same opinion. I think that the magistrate rightly held that a forfeiture of any part of a

1903

KESLAKE v. BOARD OF TRADE.

Channell J.

seaman's wages on the ground of desertion must be determined by a Court of competent jurisdiction, and cannot be the subject of a private arrangement between the seaman and the owners. It is clear from the language of ss. 221 and 232 that forfeiture of wages is regarded as a penalty for the offence of desertion to be enforced by criminal proceedings. It is equally clear that the private arrangement which was come to in this case was in the nature of an arrangement with respect to the forfeiture of the seaman's wages. That being so, although, no doubt, the seaman signed the authority to the appellant to make the deduction with full knowledge of what he was doing, the arrangement was not one which it was the duty of the superintendent to recognise by being present when the wages were paid.

I say nothing as to what would be the effect of a seaman agreeing to a deduction from his wages after desertion in consideration of the owner refraining from suing him for damages for breach of contract. That case is not now before the Court, and would be a very different one from the present case.

Appeal dismissed.

Solicitors for appellant: *Botterell & Roche.*
Solicitor for respondents: *Solicitor to the Board of Trade.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1903
July 29.

In the Matter of an Arbitration between STONE and HASTIE.

London—Buildings—Party Wall—Expense of Raising—Building Notice—Difference between adjoining Owners — Arbitration — Jurisdiction of Arbitrators—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88, 90, 91, 95.

The owners of a house in London made an addition to it which involved the raising of the party wall between it and the adjoining house. They afterwards let the house to the appellant for twenty-one years. Some time after the respondent, who was the owner of the adjoining house, pulled it down and rebuilt it, thereby using the party wall to a greater extent than before the alteration. The respondent having given notice to the appellant of his intention to do the work under s. 90 of the London Building Act, 1894, and the appellant not having consented thereto, a difference thereupon arose between the respondent, as building owner, and the appellant, as adjoining owner, within the meaning of s. 90 of the Act. Arbitrators having been appointed to settle that difference under s. 91 of the Act, they by their award (inter alia) directed payment by the respondent to the appellant of a sum of money in respect of the extended use by the respondent of the party wall:—

Held, that the appellant was not, as tenant of the first-mentioned house, entitled to any such payment, and that the arbitrators, in awarding such a payment, had acted beyond their jurisdiction, and consequently pro tanto their award was invalid.

Appeal from the order of Walton J. at chambers as after mentioned.

The appellant Hastie was the lessee for a term of twenty-one years of a house known as No. 17, Queen Street, Mayfair. The respondent Stone was the assignee of the ground lease of the adjoining house, No. 16. Before the lease to the appellant, his lessors, who were trustees, had made some addition to the house No. 17, which involved the raising of the party wall between that house and No. 16. Some time after the lease to the appellant the respondent Stone pulled down the house No. 16, and rebuilt it, thereby using the party wall to a greater extent than before the alteration. Before commencing the work, he served upon the appellant a notice of his intention

C. A. 1903

STONE AND HASTIE, *In re.*

to do the work under s. 90 of the London Building Act, 1894. The appellant did not within the time specified by the section consent to the work; and consequently by the terms of the section a difference thereupon arose between the respondent as building owner and the appellant as adjoining owner. The respondent and the appellant each appointed a surveyor, and the two surveyors appointed a third surveyor, for the purpose of settling the difference in pursuance of s. 91 of the London Building Act, 1894. The arbitrators subsequently made an award in the matter by which, after reciting that, the works in connection with the party wall having been carried out by the building owner, certain claims were made upon him by the adjoining owner for compensation for damage done to his premises during the building operations, and for a moiety of the value of the wall in excess of that portion which was formerly used as a party wall of the buildings occupying the site of No. 16 removed that was now made use of in the erection of the new buildings of the building owner, they awarded that the sum of 18*l.* should be paid by the building owner to the adjoining owner in full discharge of all damage caused to the premises of the adjoining owner by reason of the works in connection with the new buildings (1), and that the sum of 38*l.* 10*s.* 6*d.* should be paid by the building owner to the adjoining owner in payment for the extra use made of the said wall as a party wall for the new building in excess of the portion previously used as a party wall for the old buildings formerly occupying the site of No. 16, Queen Street. They also gave certain directions as to the costs of the award. The respondent did not appeal to the county court against the award. The appellant applied to a master at chambers for leave to enforce the award under s. 12 of the Arbitration Act, 1889. The master granted the application. On appeal against his order Walton J. allowed the appeal, holding the award to be invalid as to the above-mentioned sum of 38*l.* 10*s.* 6*d.* (2)

(1) No question was raised as to the validity of the award as regards this sum of 18*l.*

(2) The learned judge considered the case and wrote a judgment, in which, after stating the facts, he proceeded as follows: "I am invited by both parties to decide the question

July 28. *Hansell*, for the appellant. First, there not having been any appeal to the county court against the award in this case, by virtue of s. 91, sub-s. 2, of the London Building Act, 1894, it is conclusive, and the respondent cannot now question its validity.

Secondly, the respondent having through his arbitrator gone into the question as to the payment for extended use of the party wall, and his own arbitrator having joined in making the award, the respondent cannot now dispute the jurisdiction of the arbitrators in relation to it.

Thirdly, it was competent to the arbitrators to award

---

whether or not the award is as to the 38*l.* 10*s.* 6*d.* ultra vires and void. For this purpose it is necessary to consider whether the claim in question was a matter in difference between Mr. Hastie and Mr. Stone, arising with reference to the work to which the notice of January 18, 1902, related. It was urged on behalf of Mr. Stone that the party wall was raised at the expense of the trustees and not of Mr. Hastie, that he became tenant of No. 17 under a lease which was granted after the party wall had been raised, and the expense incurred by the trustees, and that the payment by Mr. Stone of a proportion of such expense was a matter between Mr. Stone and the trustees, and not a matter in difference between Mr. Hastie and Mr. Stone arising with reference to the work to which the notice related. There was no evidence, and indeed no suggestion, that the trustees had assigned to Mr. Hastie their right to recover from the owner of No. 16 a proportion of the expense incurred by the trustees in raising the party wall. It certainly does not necessarily follow from the fact that the trustees granted a lease of No. 17 to Mr. Hastie that he had become entitled to any of their rights in respect of such contribution. I cannot find anything in the London Building Act, 1894, which makes the award binding on the trustees. With regard to the payment of expenses by 'owners,' s. 173 imposes the liability primarily upon the 'owner' immediately entitled to possession, leaving questions of contribution as between successive owners to be adjusted by arbitration. But there is nothing in the Act which gives to the 'owner' in possession a primary right to receive or recover contributions. I cannot find anything in the Act which gives to the arbitrators in an arbitration to which the trustees are not parties jurisdiction to award to Mr. Hastie as against Mr. Stone a contribution for which he is at all events directly and primarily liable to the trustees, and the right to which has not been assigned by them to Mr. Hastie. Mr. Stone has offered to pay the amounts awarded by the award other than the sum of 38*l.* 10*s.* 6*d.* These amounts should be paid to Mr. Hastie. I think that the appeal from the master must be allowed. If leave is necessary I give leave to appeal."

C. A. 1903

STONE AND HASTIE, *In re.*

payment of a sum to the appellant in respect of the extended use by the respondent of the party wall. Sect. 95, sub-s. 2, of the London Building Act, 1894, provides that, where a building owner raises a party structure, he shall in the first instance bear the expense of raising it, but that, if at any time the adjoining owner makes use of the party structure so raised, beyond the use of it made by him before the alteration, he shall bear a due proportion of the expenses of raising the structure, having regard to the use made of it by him. The appellant's lessors were the building owners in respect of the raising of the party wall, and the respondent, as an adjoining owner who has since made use of the new part of the wall, is liable now to pay for the use of it. The question is to whom such payment is due. The appellant, as occupying tenant of No. 17 for a term of years, comes within the definition of "owner" given by s. 5, sub-s. 29, of the London Building Act, 1894, and it is submitted that he is the person entitled as against the respondent to payment in respect of the extended use of the party wall under s. 95, sub-s. 2, of the Act. A greater burden is thereby thrown upon the premises of which he is in occupation as lessee. The Act clearly appears to contemplate that the matter shall be one between the persons who are adjoining owners at the time when the payment in respect of the extended user becomes due. Sect. 91, sub-s. 1, of the Act empowers the arbitrators to determine "any other matter arising out of or incidental to such difference." Those words clearly cover the matter of the right to payment for the extended use by the respondent of the wall.

Clavell Salter, for the respondent. Sect. 91, sub-s. 2, of the London Building Act, 1894, only applies to an award made by the arbitrators within the jurisdiction given to them by the Act. It cannot apply to their award so far as it deals with a matter entirely outside that jurisdiction. It is not a question here of a voluntary submission to arbitration. The arbitration is compulsory under the statute, and the jurisdiction of the arbitrators depends on, and is confined within the limits of, the statute. The arbitrators had no jurisdiction to award any sum to the appellant in respect of the expense of originally

raising the party wall: and there is no provision in the London Building Act, 1894, for any such payment to a person in the position of the appellant. The ss. 87 to 91 of the London Building Act, 1894, form a group of sections providing for the reciprocal rights of building and adjoining owners with regard to work proposed to be done, and for arranging differences between them as to those rights in the course of building operations. The arbitration provided for in s. 91 relates only to such differences, and has nothing to do with any question with regard to any payment to be made under s. 95, sub-s. 2, upon an extended use by one adjoining owner of a party wall originally raised by another.

Sect. 95, sub-s. 2, contemplates that such payment will be by way of recoupment of the owner who raised the wall, and originally bore the whole expense of doing so. There is no reason why the appellant, who did not become tenant till after the wall was raised, and never paid any part of the expense of raising the wall, should receive the payment to be made in respect of the extended user of the wall. The appellant is only a lessee for twenty-one years, and, though it is not perhaps quite clear whether he has been awarded the whole of the estimated value of the extended user of the wall or only a part of it, it would rather appear from the claim recited in the award that he has been awarded the whole. There could not be jurisdiction to award him this as a mere lessee for twenty-one years. There is no provision in the Act by which he could be made to account for any part of the payment made to him to his lessors. The payment to be made by the adjoining owner in respect of the extended use of the raised party wall under s. 95, sub-s. 2, is not a payment for the use of the wall, but a contribution to the original expense of raising the wall.

[MATHEW L.J. It does not appear clear that the sum awarded represents the whole amount payable in respect of the extended use of the wall by the respondent. Assuming anything to be payable to the appellant in respect of the use of the wall, would not any question of amount be mere matter of appeal to the county court?]

C. A. 1903

STONE AND HASTIE, *In re.*

That must perhaps be admitted, but the contention for the respondent is that nothing is so payable to the appellant.

Hansell, for the appellant, in reply. Under s. 95, sub-s. 2, the payment is to be proportionate to the use made by the adjoining owner of the wall, which shews that the payment is really for the use of the wall, although the value of the increased user of the wall is measured by reference to the original cost of raising it. If the owners who originally raised the wall were to sell the house, instead of merely letting it for twenty-one years, it is submitted that the right against the adjoining owner under s. 95, sub-s. 2, would clearly pass to their vendees, and must be taken to be included in the price given for the house. Then, if they merely demise the house, instead of selling it, pro tanto, at any rate, they part with their right, and the appellant is therefore entitled to some payment. [He cited *List* v. *Tharp*. (1)]

Cur. adv. vult.

July 29. COLLINS M.R. This is an appeal from the decision of Walton J. at chambers upon a question which arose between owners of adjoining premises as to the expenses of raising a party wall. The question arises thus. One Hastie was the tenant for a term of twenty-one years of premises known as No. 17, Queen Street, Mayfair. His lessors, who, as trustees, were owners of a long lease of the premises, had, before the lease to him, made certain alterations in the premises which embraced the raising to a considerably greater height of the party wall which separated that house from the adjoining house, No. 16. After that operation was completed, the premises were, as I have said, let to Hastie for twenty-one years; and subsequently to that lease the respondent Stone acquired the long lease of the adjoining house No. 16, and commenced building operations, which involved the pulling down of the house No. 16 and its re-erection to a height exceeding that of the old house, and consequently a user by Stone of that portion of the party wall which had been recently erected by Hastie's lessors. There are provisions in the

(1) [1897] 1 Ch. 260.

London Building Act, 1894, to which I will refer more particularly later on, regulating the rights of adjoining owners as to a party wall, and providing for (among other things) the case of one of two owners whose premises adjoin raising a party wall for the purpose of enjoying the benefit of that alteration himself, at a time when the other owner has no desire that the wall should be raised, and does not contemplate any user of the part added to the old wall. It is provided that in that case the building owner must in the first instance bear the whole of the expense of raising the wall himself; but there are provisions which deal with the case where the adjoining owner afterwards uses the wall so raised to a greater extent than he did before the alteration, and provide for a contribution by him to the original expense of raising the wall, proportionate to his user of it, when for the first time he takes the benefit of the alteration. In this case the respondent Stone in building his house had to interfere with the party wall, both that part of it which was old and that part which was added by Hastie's lessors. It is part of the scheme of the London Building Act, 1894, to lay down a code regulating such matters as between building owners and the owners of adjoining premises, and providing (among other things) what their rights shall be with regard to a party wall which separates their premises. I will presently allude to the material sections of the Act more particularly, but their general effect seems to be as follows. The Act first provides that the building owner may do certain things, and gives reciprocal rights to the adjoining owner; and provision is made for the giving of notice by a building owner of what he proposes to do, and a cross-notice by the adjoining owner of what he requires to have done by the building owner for his protection and benefit, in pursuance of the reciprocal rights given to him; and then follow provisions for the reference to arbitration of any difference which may arise between the building owner and the adjoining owner as to the execution of the works specified in the notices. All these are a class of provisions which deal with the adjustment of the rights of the adjoining owners inter se with regard to the work to be done upon an interference by a

C. A. 1903

STONE AND HASTIE, *In re.*

Collins M.R.

building owner with a party wall. That is one set of provisions. Then comes another set of provisions dealing with the expenses of work in connection with (among other things) party walls, which is done really for the benefit of both the building owner and the adjoining owner, and with respect to which it is therefore provided that the expenses of doing it shall be borne by them jointly. Then the Act provides for cases in which a building owner (among other things) raises a party wall under the powers previously given him by the Act, the adjoining owner at that time not desiring that the wall should be raised, or to use the added part of it; in which case it is provided, as is obviously just and convenient, that the building owner shall bear in the first instance the whole cost of raising the wall, but that, if at any future time the adjoining owner makes any use of the wall so raised beyond the use of it made by him before the alteration, he shall bear a due proportion of the expenses, having regard to the use that he makes of the wall. That is, as it seems to me, a separate provision parallel with but distinct from the earlier provisions which deal with what a building owner shall have a right to do, and the reciprocal rights of an adjoining owner against him to which I have alluded.

In the present case the situation arose which is provided for by the earlier provisions of the Act to which I have referred—namely, those which provide as to the respective rights of the parties in view of the fact that the house of which Hastie was tenant adjoined the house of the building owner, Stone. In accordance with those provisions a notice was given by Stone of what he was going to do, with an invitation to Hastie to assent to, or dissent from, the proposed works. The Act provides that, if the adjoining owner does not assent to the works within fourteen days after the service on him of the notice, which he did not do in the present case, he shall be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the two owners. The jurisdiction of the arbitrators is then let in, but they have no jurisdiction whatever to decide anything beyond the dispute which is so submitted to them by virtue of the statute. I do

not think that the arbitration so provided for contemplates any question between the parties with regard to the initial expenses of raising the party wall in such a case as this. A difference having thus arisen, the arbitrators made an award in favour of the appellant Hastie, who, as I have said, was a tenant for a term of twenty-one years, embracing in it a portion of the expenses of raising the party wall, which he had not incurred himself. He contended that under the circumstances the dispute to be determined by the arbitrators, which in my opinion was confined to the matters I have mentioned, embraced a right on his part to claim a portion of the expenses which had been originally incurred by his lessors in raising the party wall. The respondent, Stone, objected to that claim, and contended that it was wholly outside the scope of the reference, that any obligation under which he might be with regard to those expenses was not to Hastie, the tenant, but to his lessors, and that therefore the arbitrators had no jurisdiction to award any sum to Hastie in respect of those expenses. Whether that is so is the question which we have to decide. The appellant took steps to enforce the award, and the learned judge at chambers on the invitation of the parties decided the question whether the arbitrators had any jurisdiction to make an award with reference to the appellant's claim in respect of the initial expenses of raising the party wall. The learned judge gave a very clear and careful judgment, arriving at the conclusion that the arbitrators had no jurisdiction to deal with the claim so made by the appellant. The appellant now appeals against his decision.

It will now be convenient that I should shortly go through the material sections of the London Building Act, 1894. I begin with s. 87. That section deals with the rights of owners of adjoining lands in regard to the erection of a wall on the line of junction, and provides for the case in which they agree that it shall be done for their joint benefit, and also the case in which the building owner does it separately. Sect. 88 gives a building owner a right of doing certain works to party structures, including the raising of such a structure, and imposes upon him the condition of making good any damage

C. A. 1903

STONE AND HASTIE, *In re.*

Collins M.R.

to the adjoining premises thereby occasioned. Sect. 89 gives to the adjoining owner the right to require the performance of certain works by a building owner who proposes to exercise any of the foregoing rights with respect to party structures. Then by s. 90 rules are laid down as to the exercise of these rights by building and adjoining owners, and provision is made for the giving of notice of the work which the building owner proposes to execute, and counter-notice of the requisitions made by the adjoining owner. By sub-s. 7 of s. 90 it is provided that, if either owner does not, within fourteen days after service upon him of any notice, express his consent thereto, he shall be considered to have dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner. Then by s. 91 provision is made for the settlement of such differences. The section provides "in all cases not specially provided for by this Act where a difference arises between a building owner and an adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of the Act relates" for the appointment of a surveyor or surveyors as arbitrators, who shall "settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by his or their award to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference." By sub-s. 2 of the section it is provided that the award so given shall be conclusive, and shall not be questioned in any Court with the exception that either party may appeal to the county court within fourteen days. This sub-section gives rise to one of the points taken by the appellant, who contends that in this case, there having been no appeal to the county court, the award cannot now be questioned. Following at some distance these provisions for the settlement of disputes such as I have mentioned are the provisions which apply to the case in which one of two adjoining owners has raised the party wall, and the other does not at that time wish to make any use of the wall as raised. The important provision is in s. 95, though

incidental provisions are to be found in ss. 92–94. By sub-s. 1 of s. 95 provision is made, in certain cases of work done by way of repair, or rebuilding, of structures which are used by both owners, for throwing the expense of such work upon them jointly. Then by sub-s. 2 (*a*) it is provided (inter alia) that, if any party structure is raised in pursuance of the power by this part of the Act vested in a building owner, the expense of raising the same, and of making good all damage occasioned thereby, shall be borne by the building owner. Then follow a number of other cases in which expenses are to be borne by the building owner; and then comes the following provision: "If at any time the adjoining owner make use of any party structure or external wall, or any part thereof, raised . . . . as aforesaid . . . . beyond the use thereof made by him before the alteration, there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owner may make thereof):—(*i*) of raising . . . . such party structure." So by the terms of the Act the expenses incurred by a building owner in raising a party wall, which an adjoining owner will have an opportunity at some future time of using, but which is of no advantage to him at the time, are to be borne in the first instance wholly by the building owner; but there is a possibility of the recoupment of some part of the expenses if and when the wall so raised is used by an adjoining owner. Does the statute contemplate that a portion of the original expense of the work shall be thus recouped to any one other than the owner who raised the wall? The provisions of the Act appear to me to contemplate that the recoupment shall be to the owner who raised the wall; and there does not appear to be any provision which contemplates any payment to a person, who, like the appellant, becomes a tenant of the premises for twenty-one years, after the raising of the wall. There is one other section which appears to point in the same direction, namely, s. 99, which provides that, where the adjoining owner is liable to contribute to the expenses of building any party structure, then, until such contribution is paid, the building owner at whose expense the same was built shall stand possessed of the sole

C. A. 1903

STONE AND HASTIE, *In re.*

Collins M.R.

property in the structure. I think it is obvious when this code is looked at that it provides for the recoupment of the owner at whose expense the wall was raised, and not of any one else. A tenant like the appellant might, as it appears to me, just as well claim a right to a share of the money originally expended in building the old party wall as a right to a share of the money expended in raising it. The appellant never became a tenant till after both the old and the new portion of the wall had been built. The case appears to me quite clear. I think the provisions of the Act restrict the questions with which the arbitrators have to deal in the statutory reference to the differences arising between a building owner and an adjoining owner as mentioned in s. 91, and that such a reference does not embrace any claim on the part of a tenant in the position of the appellant to a share of the expenses originally incurred in raising the party wall. It follows that the arbitrators had no jurisdiction to award to the appellant anything in respect of such a claim, and that the appeal must therefore be dismissed.

MATHEW L.J. I agree in the judgment of the Master of the Rolls, and the reasons given by him. The definition of "owner" in s. 5, sub-ss. 29 and 32, treats the term as applicable to an owner in the ordinary sense, and to an occupying tenant other than a tenant from year to year or a tenant at will. It is not disputed that under s. 90, which refers to occupiers, Hastie is entitled to the sum of 18*l.*, which the arbitrators have assessed as compensation for the loss sustained by him by the alterations made by Stone in the party wall. It is said that Hastie is further entitled to compensation for the additional use of the party wall. The argument was this. The lessors of Hastie would be, if they were in possession, entitled to claim compensation for the additional burden upon their estate consequent upon the raising of the party wall. The land upon which half the party wall stands has more to bear, and for this, which is in the nature of an easement, the owner, it is argued, should be paid by Stone. But, as the land is let to Hastie, it is urged that he is entitled to a share in the compensation, and that the arbitrators have finally fixed what his share in money

should be, namely, 38*l.* 10*s.* 6*d.* Now it may be questioned whether the trustees are entitled to any compensation from Stone. An examination of the sections as to the rights of building and adjoining owners would seem to shew that merely raising a wall may not be provided for. But, assuming that there would be a right upon user to compensation in the owner, the statute contains no provision transferring the whole or any part of the right to his tenant. It is difficult to see how the value of the tenant's supposed share could be estimated in money. If the party wall be properly raised, the tenant is in no worse position than if it had not been altered. There is no good reason for supposing that the Legislature intended to recognise any such right in a tenant. According to the argument, this right would be possessed by any tenant who held for more than a year—a result which would seem to be altogether unreasonable.

Appeal dismissed.

Solicitors for appellant: *Hasties.*

Solicitors for respondent: *Le Brasseur & Oakley, for Stone, King, Stone & Thomas, Bath.*

E. L.

1903
June 13.

ELLIOTT *v.* CRUTCHLEY AND ANOTHER.

Contract—Performance—Prevention by Accident—Misfortune beyond Control of either Party—Cheque given in Part Payment before Performance rendered impossible—Payment of Cheque subsequently stopped—Right to recover on Cheque.

The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the "Navy League," to supply at an agreed rate the refreshments on a steamer hired by the defendants for the purpose of taking members of the Navy League to the naval review on the occasion of the King's coronation. By the contract 300*l.* was to be paid by the defendants to the plaintiff on the Monday previous to the review day, and it was a term of the contract that, in the event of the cancellation of the review before any expense had been incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, &c., but nothing on refreshments. A cheque for 300*l.* was sent by the defendants to the plaintiff on the stipulated day, but was not paid by the plaintiff into his bank. On the next day, owing to the illness of the King, the review was cancelled. An endeavour was subsequently made to effect an arrangement between the parties, but ultimately the defendants stopped payment of the cheque before it was presented:—

Held, in an action on the cheque, that upon the cheque being stopped the rights of the parties were the same as though it had never been given, and that the plaintiff was not entitled to recover.

ACTION tried before Ridley J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge.

"In this case the plaintiff sued on a cheque for 300*l.* drawn by the defendants on June 23, 1902. It appears that the plaintiff is a refreshment contractor or caterer who (amongst other things) provided refreshments for passengers using the steamers owned by a company called the Coast Development Company. In March, 1902, an arrangement was arrived at by which that company agreed to place at the disposal of a society called the Navy League one of their steamers called the *Yarmouth Belle* for the naval review to be held on June 28 in connection with the coronation of his present Majesty, and as a part of that arrangement it was agreed that the plaintiff should do the catering for the steamer on that occasion. On March 4 the

terms of the agreement were set out in a letter as follows: 'He will supply the three meals, lunch, tea, and dinner, as per menu, at 12*s.* 6*d.* per head, &c., you guaranteeing not less than 600 passengers and paying for all over that number; wines and other drinks to be paid for by you at the company's ordinary tariff prices; 300*l.* to be paid to Mr. Elliott on account of the refreshments on the Monday previous to the review day.' There was a letter of March 5 written by the defendants on behalf of the Navy League in answer to this, which accepted the terms and contained a postscript: 'It is of course understood that in the event of the cancellation of the review before any expense is incurred by the contractor there shall be no liability on our side.' The plaintiff incurred on or before June 23 some expense in the purchase of extra knives, forks, and crockery, and in printing tickets, but some of this expenditure was for other steamers hired on a like errand, and I think it probable that the amount so expended for this steamer might be taken at 20*l.*; but he expended nothing on refreshments, and he has possession of and can use in his trade the articles bought; so that no money can be said to have been thrown away except the cost of printing the tickets, which was about 2*l.*

"On June 23 the cheque in question was sent to the plaintiff, signed by the two defendants as officers of the Navy League. On the 24th it became known that owing to the illness of the King the review would not be held, and nothing more was done, the steamer never leaving the Thames, where she was lying. The defendants on the 25th wrote to the plaintiff saying that, as the arrangements for the naval review were cancelled, they thought that the greater proportion of the cheque should be refunded; but the plaintiff did not answer this letter. On July 15, however, he called on Captain Crutchley, who represented the Navy League, and contended that he was entitled as to this steamer (for he had contracts relating to others) to all the money which he would have received if the trip had been carried out. It is not quite clear what Captain Crutchley said, but according to the plaintiff he was willing to pay 250*l.*; he was at all events willing to allow all expenses. But in the

1903

ELLIOTT v. CRUTCHLEY.

conversation it came out that the plaintiff had not paid the cheque into his bank, and after he left Captain Crutchley stopped the cheque, so that when it was presented it was dishonoured, and upon it this action was now brought."

Witt, *K.C.*, and *Poley*, for the plaintiff. The plaintiff is entitled to recover. The contract gave him the right to a payment of 300*l.* in advance, and that right is not affected by the postscript to the defendants' letter, for expense was in fact incurred by the plaintiff before the review was abandoned, and the contract became impossible of performance in the manner contemplated when it was entered into. The plaintiff was entitled to sue in respect of that 300*l.* on the Monday before the day fixed for the review, and could have at once sued for it had the cheque not been sent to him on that day. Having a cause of action before the cancellation of the contract, the plaintiff's rights are not affected by the fact that the contract subsequently became impossible of performance, and the defendants could not legally stop payment of the cheque.

Shearman, *K.C.*, and *Eustace Hills*, for the defendants. Looking at the contract apart from any special terms in it, the authorities clearly shew that it could not now be enforced. The contract came to an absolute end by reason of its becoming impossible of performance, and in such a case neither party to a contract can sue upon it: *Appleby* v. *Myers* (1); *Taylor* v. *Caldwell*. (2) It is true that a cheque had been given by the defendants to the plaintiff; but payment of that cheque had been stopped, and the plaintiff was in no better position as the holder of a stopped cheque than he would have been if the cheque had never been given to him by the defendants: *Cohen* v. *Hale*. (3) The expenditure incurred by the plaintiff was not such an expenditure as was contemplated by the contract, for it was incurred in respect of articles which became a permanent addition to his stock-in-trade.

Cur. adv. vult.

(1) (1867) L. R. 2 C. P. 651. (2) (1863) 3 B. & S. 826.
(3) (1878) 3 Q. B. D. 371.

June 13. The following written judgment was delivered by

1903

ELLIOTT v. CRUTCHLEY.

RIDLEY J. [The learned judge, after stating the facts as above, continued :—] In *Taylor* v. *Caldwell* (1) and in *Appleby* v. *Myers* (2) the law applicable to such cases as the present was laid down, and it appears to me to come to this: that where the performance of a contract without fault on either side becomes impossible by the destruction of premises, or by such an event as occurred in the present case, that "is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." This principle was applied by the Divisional Court in *Blakeley* v. *Muller* (3) in a case similar to the present. There the plaintiff took seats on a stand to view the Coronation Procession on June 27, 1902, and paid for them. A suit was brought in the county court to recover the money, and judgment was given for the defendant. The Divisional Court, affirming this, said that where performance of a contract becomes impossible from some cause for which neither party is responsible, and the party sued has not contracted or warranted that the event, the non-occurrence of which has caused the contract not to be possible of performance, shall take place, then the parties are excused from further performance of the contract. But, they said, the consequence of that is that neither party can sue or be sued for anything to be done afterwards. The defendants could not be compelled to complete the seats, and the plaintiff could not be sued for the price thereof. Each party rests in the position in which he was found when the event occurred, unless there is something in the terms of the contract which gives a special right to either party. That is the effect of the judgment, though in a previous case (4) Darling J. appears to have thought differently, and to have allowed money paid to be recovered back. In the present case, if the 300*l.* had been paid in cash, it seems that it must have remained, according to the principle laid down by the Divisional Court, in the plaintiff's hands,

(1) 3 B. & S. 826.
(2) L. R. 2 C. P. at p. 659.
(3) (1903) 88 L. T. 90.
(4) *Krell* v. *Henry*, (1902) 18 Times L. R. 823.

1903

ELLIOTT v. CRUTCHLEY.

Ridley J.

unless there be something special in the contract—a point with which I must deal later in regard to the postscript above mentioned.

But the cheque which was sent to the plaintiff having been stopped, what is the position of the parties? According to *Cohen* v. *Hale* (1), it is as though it had never been given; the debt remains in such a case as though there had been no cheque, and the party to whom it was sent is remitted to his original right on the consideration for the cheque. Adopting this (and I do not think it has been questioned), here, if each party is to rest in the position in which he was found when the event occurred, the defendants are entitled to succeed. Their right to do so depends on the accident that the cheque was not presented by the plaintiff; but it is none the less their right, and it is in accordance with the merits of the case, for the money was to be paid on account of the refreshments to be supplied, and the plaintiff has expended nothing on that account, and therefore has done nothing to earn it.

But it was argued that while the above principle, as to the effect of such an occurrence on a contract to be performed, must be accepted, still here there was a cause of action vested on June 23, before the event occurred, and that could not be taken away, the case being similar in effect to one of advance freight: *De Silvale* v. *Kendall*. (2) But the loss of freight owing to non-performance of a voyage is, to my mind, quite different from the performance of a contract being rendered impossible by the occurrence of such an event as we have to consider, and gives rise to quite different considerations. It may be, however, that there is a difference between the right to sue for a payment due on a fixed date before the event occurs, and the right to sue for anything to be done afterwards, and some colour is lent to this contention by some observations of Channell J. in his judgment in *Blakeley* v. *Muller*. (3) It seems, indeed, to be quite consistent with the judgment of the Exchequer Chamber in *Appleby* v. *Myers* (4) that, if the contractor in that case had made it a term of the contract that he

(1) 3 Q. B. D. 371.
(2) (1815) 4 M. & S. 37; 16 R. R. 373.
(3) 88 L. T. 90.
(4) L. R. 2 C. P. 651.

should be paid by fixed instalments for the work as it was done, instead of leaving the payment till completion of the work (as he did), he would have been able to recover such instalments as were then already due for work done when the fire occurred; and I think the observations of Channell J. must be read as having reference to such a condition of things when he said, "If it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back, and it could be sued for." But in this case the 300*l.* in question is not payable simply as an instalment for work then done, as in the instance suggested, but "on account of the refreshments," i.e., the refreshments of the passengers on the voyage which has become impossible. I think, therefore, that this argument ought not to prevail, and that, unless the postscript to the letter of March 5 imports into the contract a special term, the plaintiff is not entitled to recover.

That postscript was added on the defendants' behalf, and is a little difficult of construction. It was at one time argued for the plaintiff that the intention was, in the event of cancellation of the review before expense incurred, to relieve the defendants of liability; but in the event of cancellation after expense incurred, to leave them liable—liable, that is to say, to perform the contract or pay damages for not performing it. It must have been contended that that was the meaning by the plaintiff when the interview took place on July 15, for there is nothing in the letter of March 4 on which he can have placed reliance as having that effect. At the hearing, however, it was not necessary to press the argument so far as this, for the only question was the right to recover on the cheque. But upon that subject I am unable to find that the postscript has any bearing. I think it means one of two things: either, if expense shall not have been incurred before the event, the defendants shall not be liable, but that, if it has, they shall (that is to say, liable in damages for not performing the contract); or else that if expense shall not have been incurred before the event the defendants shall not be liable for anything, but that, if it has, then they shall, for the amount of such

1903

ELLIOTT v. CRUTCHLEY.

Ridley J.

expenses. If the plaintiff's argument be adopted as to its construction, it means that the defendants are to be liable to perform the whole contract in any event so soon as expense be incurred: an unreasonable construction, and one which the plaintiff's counsel did not urge. But it does not seem to apply to the cheque. In my judgment, however, the other construction is the better, though the words of the postscript do not completely express that meaning.

I understand from the correspondence that the defendants have throughout offered to make good all expenses incurred by the plaintiff; but the latter at first insisted on payment of the full amount to which he would have been entitled on performance of the contract, and later on upon payment of the cheque. In this contention I think, though the case is one of nicety, that he is wrong, and therefore the judgment must be for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Samuel Price & Sons.*

Solicitors for defendants: *Dowson, Ainslie & Martineau.*

W. J. B.

MILE END GUARDIANS *v.* HOARE.

1903
July 8.

Factory Acts—Factory—Electrical Station—"Public Building"—Workhouse—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1; *Sched. VI., Part I., clause* 20.

By s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, "non-textile factory" means (inter alia) any places named in Part I. of Sched. VI. of the Act. By clause 20 of Part I. of that schedule "electrical stations" are defined as being "any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade, or for the lighting of any street, public place, or public building, or of any hotel, or of any railway, mine, or other industrial undertaking."

An engine-house and machinery, forming part of the premises of a workhouse, were used for the purpose of generating electrical energy for lighting the workhouse and infirmary, and for other purposes. One of the engines in the engine-house was unfenced:—

Held, that the workhouse was a public place within Sched. VI., Part I., clause 20, and was therefore a non-textile factory within the meaning of s. 149, sub-s. 1, of the Factory and Workshop Act, 1901.

Case stated by a metropolitan police magistrate.

An information had been preferred on behalf of the respondent, an inspector of factories and workshops, against the appellants, charging that a certain factory within the intent and meaning of the Factory and Workshop Act, 1901, situate at Bancroft Road, Mile End, of which they were then the occupiers, was not kept in conformity with the said Act, that is to say, a certain steam-engine was not securely fenced. At the hearing the following facts were admitted or proved.

The appellants had the government and control of the workhouse and infirmary situate at Bancroft Road, Mile End, under and subject to the Poor Law Amendment Acts. Within the premises of the workhouse and infirmary and forming part thereof were an engine-house and machinery used by the appellants for the purpose of generating electrical energy for the lighting of the workhouse and infirmary, for working their hydraulic lifts, and for cutting wood. The machinery included two engines, one of which was not securely fenced.

Sect. 149, sub-s. 1, of the Factory and Workshop Act, 1901, provides (inter alia) that the expression "non-textile factory"

1903

MILE END UNION v. HOARE.

means (*a*) any works, warehouses, furnaces, mills, foundries, or places named in Part I. of the 6th schedule of the Act. The 6th schedule, Part I., clause 20, is as follows: "Electrical stations—that is to say, any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade, or for the lighting of any street, public place, or public building, or of any hotel, or of any railway, mine, or other industrial undertaking."

The respondent contended that the engine-house was a factory within the meaning of the Factory and Workshop Act, 1901, Sched. VI., Part I., clause 20, on the ground that the workhouse and infirmary were public buildings within the meaning of that Act. It was contended on behalf of the appellants that the engine-room was not a factory, as the workhouse and infirmary were not public buildings within the meaning of the Act.

The magistrate was of opinion that the workhouse and infirmary were public buildings within the meaning of the Factory and Workshop Act, 1901, and that the engine-house was therefore a factory, and convicted the appellants. The question for the opinion of the Court was whether he was right in so deciding.

Danckwerts, K.C. (*J. D. A. Johnson* with him), for the appellants. A workhouse is not a factory, for it is not a public building within the meaning of the Factory and Workshop Act, 1901. Primâ facie a public building is one to which the public has a right of access. As used in clause 20 of Part I. of the 6th schedule the expression "public building" is applied to buildings used for electrical supply by way of trade; the collocation of words shews that it is electrical plant used in trade that is aimed at. The case of *Liskeard Union* v. *Liskeard Waterworks* (1) shews that water supplied to a workhouse for domestic purposes was not a supply "for public purposes" within the meaning of the Waterworks Clauses Act, 1847, or a special Waterworks Act; but that decision is not strictly in point.

(1) (1881) 7 Q. B. D. 505.

1903

MILE END UNION v. HOARE.

G. S. Robertson, for the respondent. The supply of electricity by way of trade is not a necessary factor in the definition of "electrical stations" in clause 20, which is framed in the disjunctive, and after dealing with trading concerns, proceeds, "or for the lighting of any street, public place, or public building." The case of *Bedford Guardians* v. *Bedford Improvement Commissioners* (1) is a direct authority that a workhouse is a public building for the purposes of a local rating Act. Nor is a public right of access the proper test; the Law Courts are a public building, though they are not necessarily open to the public. The Malicious Damage Act, 1861, s. 5, which deals with setting fire to public buildings, includes property belonging to a poor law union. The intention of clause 20 was to exclude from the operation of the Act only small installations in private houses.

Danckwerts, K.C., in reply.

LORD ALVERSTONE C.J. The case raises a question of some difficulty, which is whether a workhouse comes within the expression "public building" as used in clause 20 of the 1st part of the 6th schedule to the Factory and Workshop Act, 1901. The Act might have contained a definition of "public building" for the purposes of the Act, or there might have been something to indicate that only buildings used for trade purposes were intended to be within its purview; but neither course has been adopted, and the meaning of the expression is left at large. The question whether, as used in this statute, the expression "public building" includes a workhouse is not answered by either of the authorities which have been cited to us during the argument. It was admitted by Mr. Danckwerts that the case of *Liskeard Union* v. *Liskeard Waterworks* (2) was not a conclusive authority, while the only question in *Bedford Guardians* v. *Bedford Improvement Commissioners* (1) was whether for rating purposes a workhouse was a public building. On looking at the Act of Parliament which we have to construe, it is apparent that the intention is to exclude from its purview what may be described as private electrical stations. Clause 20 does not necessarily constitute the whole of any

(1) (1852) 21 L. J. (M.C.) 229. (2) 7 Q. B. D. 505.

1903

MILE END UNION v. HOARE.

Lord Alverstone C.J.

premises a factory, but "that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade"—so far no difficulty arises—"or for the lighting of any street"—that is mentioned because street lighting need not necessarily be carried on as a trade, for a local authority might light its own streets without making any profit out of it—"or public place"—those words are obviously inserted for the purpose of including places which might not come within the ordinary meaning of a street; then come the words "or public building," and the clause concludes with the words "or of any hotel, or of any railway, mine, or other industrial undertaking," all of which are in the nature of trades. I think, though not without doubt, that the effect of the language used is to exclude from the purview of the statute, first, private installations of all kinds, and, secondly, as to which I feel considerable doubt, small supplies of electricity for public buildings. I think that a workhouse comes within the expression public building in the ordinary sense in which that term is used. If we were to exclude such a building as a workhouse, our decision would give rise to a number of refined distinctions, which would fritter away much of the benefit of an Act of Parliament, the main object of which is to protect those employed in connection with electric installations of considerable size. The conviction was therefore right, and this appeal must be dismissed.

WILLS J. I have come, though with much difficulty, to the same conclusion. There are only two things common to all the establishments mentioned in clause 20: first, that they are not private installations; and, secondly, that they are not small installations. If those are the determining characteristics of a public building as dealt with in this schedule, I think that a workhouse satisfies them.

CHANNELL J. I agree.

Appeal dismissed.

Solicitor for appellants: *C. V. Whitgreave.*
Solicitor for respondent: *Solicitor to the Treasury.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1903
July 27.

MOLYNEUX *v.* HAWTREY.

Vendor and Purchaser—Lease, Purchase of—Unusual and Onerous Covenants—Duty of Vendor—Constructive Notice—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1.

On a sale of a lease containing unusual and onerous covenants it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must, in order to affect the purchaser with notice of them, shew that he gave him such an opportunity of acquainting himself with the terms of the lease under such circumstances that he ought reasonably to have done so.

APPEAL of the plaintiff from the judgment of Wright J. at the trial before him without a jury.

The action was brought for damages for breach of a contract whereby the plaintiff agreed to grant, and the defendant agreed to take, an assignment of the lease of certain premises, known as No. 89, Ashley Gardens, of which the plaintiff was the lessee for a term of seven years as from December 25, 1899, on the terms (inter alia) that the defendant would pay the rent of the premises under the lease as from December 25, 1901. The defence set up (inter alia) that the lease was subject to certain unusual and onerous covenants, of which the defendant had no notice when the contract was made, and which it was the plaintiff's duty to have disclosed to her, and the contract was therefore not binding on the defendant.

The lease contained various covenants of an unusual and onerous nature. Among other things, the lessee covenanted that he would not at any time during the term without the licence of the lessors make any objection on the ground of obstruction of light or for any other reason to the erection on the land situate in Ambrosden Avenue, on the side opposite to the premises known as blocks 1, 2, 3, 4, and 5, Ashley Gardens, of any cathedral or other ecclesiastical building, whatever might be the height of such building, or the practice

C. A. 1903

MOLYNEUX v. HAWTREY.

of cathedral services, including the ringing of bells at all reasonable times, in any cathedral or other ecclesiastical building which might thereafter be erected upon the said last-mentioned land, or any other land then or lately belonging to Henry Edward Cardinal Manning, Daniel Gilbert, and James Bamber, or take any legal proceedings whatsoever for the purpose of restraining the erection of any such building or the holding of any such services or ringing of bells, or for obtaining damages for any injury caused by such erection, or services, or ringing of bells.

The contract for alleged breach of which the action was brought appeared to have been made in December, 1901, the negotiations for the assignment of the lease having begun on the 9th of that month. On December 12, while the negotiations were pending, and before the parties had come to terms, the defendant's solicitor, Mr. Peckham, who was acting for her in the matter, called upon Mr. Heron, a member of a firm of house agents acting for the plaintiff, at his office, where an interview took place at which what passed, so far as material, appeared to have been to the following effect. In the course of conversation as to the terms of the proposed contract, Mr. Peckham asked whether Mr. Heron could shew him the lease. Mr. Heron replied that he could not, because it was packed away with other effects of the plaintiff which had been stored, but that it could be procured for inspection in a few days. He then produced a lease of adjoining premises, which was on a printed form, which he stated to be the form of lease used for flats on the Ashley Gardens estate, and which was in terms similar to those of the plaintiff's lease. Mr. Peckham said that he had no time then to examine the document: that there would be time for that when the parties had come to terms; and nothing more then passed on the subject. No further reference was made at the interview to the terms of the lease. No further steps were taken by the vendor or his agents for the purpose of informing the defendant, or her solicitor, of the existence of unusual and onerous covenants in the lease, nor were any further inquiries made by the defendant or her solicitor with regard to the matter; and ultimately

the contract was entered into by the defendant in ignorance of the existence of any unusual covenants in the lease. The defendant subsequently repudiated the contract as not binding upon her. The learned judge held that the defendant, not having had notice of the existence of the unusual and onerous covenants in the lease, or any fair opportunity of inspecting the lease, was not bound by the contract. He therefore gave judgment for the defendant.

Germaine, K.C., and *G. A. Scott*, for the plaintiff. The authorities no doubt shew that, upon the sale of a lease which contains unusual and onerous covenants, the obligation is imposed upon the vendor of giving to a purchaser, ignorant of the existence of the covenants, either express notice of them or a fair opportunity of acquainting himself with the terms of the lease; but, upon such an opportunity being given by the vendor, it is for the purchaser to inquire into the terms of the lease for himself. In this case a fair opportunity was given to the purchaser's solicitor of ascertaining what the covenants in the lease were; for he was proffered a document which, if he had examined it, would have informed him of the existence of the unusual and onerous covenants. If at any time afterwards he had asked to examine that document or the lease itself, he could have done so. But, having been shewn a document which would have given him the requisite information, he does not choose to examine it, and makes no further inquiry. It is submitted that, having regard to the opportunity which was afforded to him of acquainting himself with the terms of the lease, the purchaser was affected with constructive notice of its terms.

[They cited *Cosser* v. *Collinge* (1); *Hyde* v. *Warden* (2); *Reeve* v. *Berridge* (3); *In re White and Smith's Contract* (4); *In re Haedicke and Lipski's Contract.* (5)]

G. Spencer Bower, K.C., and *Rose-Innes*, for the defendant. It is not disputed by the plaintiff that, upon the authorities, it is the duty of the vendor in a case of this kind to disclose to

(1) (1832) 3 My. & K. 283; 41 R. R. 70.
(2) (1877) 3 Ex. D. 72.
(3) (1888) 20 Q. B. D. 523.
(4) [1896] 1 Ch. 637.
(5) [1901] 2 Ch. 666.

C. A. 1903

MOLYNEUX v. HAWTREY.

the purchaser the existence of the unusual and onerous covenants by giving him express notice of them or a fair opportunity of ascertaining their existence. The effect of the cases is to shew that what is meant by a "fair opportunity" in this connection is such an opportunity that it is unreasonable that the purchaser should not avail himself of it, and that he is guilty of gross negligence in not doing so: *Bailey* v. *Barnes* (1); *Ware* v. *Lord Egmont*. (2) No such opportunity was afforded to the purchaser in the present case. At a time when the parties were still negotiating, and it would really have been premature to go into the matter, a document was produced, which was not the lease itself or a copy of it, but a lease of other premises said to be in similar terms, and which the solicitor was at the time, owing to other engagements, unable to examine; and no other attempt was made to give notice to the purchaser of the unusual covenants, which it was the vendor's duty to disclose. It is submitted that the question is really one of fact, and that the learned judge was justified in finding as a fact that no reasonable opportunity of ascertaining the existence of the covenants was given to the purchaser.

Germaine, K.C., in reply.

COLLINS M.R. This is an appeal from the judgment of Wright J. in favour of the defendant in an action brought by the lessee of a flat for damages for breach of a contract to take an assignment of the lease. The question arises thus. There was no doubt a concluded agreement, partly by word of mouth and partly by correspondence, that the defendant would take an assignment of the lease. The lease was subject to covenants of an unusual and onerous character. In the case of a sale of a lease the burden is laid upon the vendor, as in the case of other vendors, of making out his title; I do not mean the freeholder's title. In the case of *In re White and Smith's Contract* (3), which was a case of the same kind as that now before us, Stirling J., after stating that the law applicable to the case was laid down by the Court of Appeal in *Reeve* v. *Berridge* (4),

(1) [1894] 1 Ch. 25.
(2) (1854) 4 D. M. & G. 460.
(3) [1896] 1 Ch. 637.
(4) 20 Q. B. D. 523.

and citing a passage from the judgment of Fry L.J. in that case, proceeded as follows: "In my opinion the last paragraph of that passage of the judgment establishes that it is primâ facie the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and that this is so whether the sale be by public auction or private contract." In the case of *In re Haedicke and Lipski's Contract* (1) Byrne J. sums up the law on the subject thus: "It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases." Therefore we begin the discussion with the principle that the burden of making the disclosure is on the vendor. Primâ facie the contract must be taken to be one for the sale of a lease containing only usual covenants; and, if there are unusual and onerous covenants, it is the duty of the vendor who knows of their existence to give information to the purchaser of the fact. He may discharge that duty by telling him directly of the existence of the covenants, or by shewing that the purchaser actually knew of them, or that such means of knowledge had been afforded to him under such circumstances that, as a reasonable man, he might be inferred to have known of their existence. In this case what happened was this. The agreement for sale of the lease was actually made subsequently to December 12. On December 9 negotiations for the purchase had been opened between Mr. Peckham, the solicitor who represented the defendant, and the representative of the plaintiff, Mr. Heron. On December 12 the former called on the latter, and, in the course of conversation, inquired with regard to the lease of which his client wished to become the purchaser. Mr. Heron said that the lease was deposited somewhere else, and could not be got at for some days, but he proffered Mr. Peckham a document, and said that it was a lease of some adjoining property, the terms of which were the same as those of the lease of the property in question, or made

(1) [1901] 2 Ch. 666.

1903

MOLYNEUX v. HAWTREY.

Collins M.R.

some such statement. The defendant's solicitor thereupon said that he was pressed with other work and could not look at the document at that time. The result was that he did not look into the document produced, and went away without any knowledge in point of fact that the lease contained any covenants of an unusual and onerous character. At the close of that interview where did the onus rest? Had it been shifted from the shoulders of the vendor, upon whom it originally lay, to those of the purchaser, whose solicitor had not in fact had any opportunity of examining the document, because he had no time then to do so? Was the vendor then entitled to say that he had discharged the onus which lay upon him, because his agent had produced to the purchaser's solicitor, not the lease which was to be assigned, but another lease which the solicitor had no time to look at, on the ground that if he had looked at it he might have learned something which the vendor's agent did not himself tell him? The question, as it appears to me, is whether a fair and reasonable opportunity of ascertaining the existence of unusual and onerous covenants was given, having regard to all the circumstances, including the facts that the solicitor's engagements debarred him from then examining the document produced, and that the vendor never took any further steps whatever for the purpose of giving the purchaser's solicitor the information, of which he was prevented from availing himself at the time. The question whether such a fair and reasonable opportunity was given as to discharge the onus which lay on the vendor is really one of fact depending on the particular circumstances of the case. The learned judge has found that the opportunity given was not such as to discharge the onus which in such cases always lies on the vendor.

The law on the subject is well established by a series of cases. The case of *Reeve* v. *Berridge* (1), to which I have already alluded, merely reiterates the law laid down in *Hyde* v. *Warden*. (2) In giving judgment in *Reeve* v. *Berridge* (1) Fry L.J. said with reference to the case of *Hyde* v. *Warden* (2): "In that case the question arose whether the taking possession of property agreed to be underleased, with notice of the

(1) 20 Q. B. D. 523. (2) 3 Ex. D. 72.

existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the Court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases, including *Cosser* v. *Collinge*. (1) The Court rejected the argument, and said: 'We think it may be considered as settled that the principle of that case can only be applied where (as, indeed, was the case in *Cosser* v. *Collinge* (1)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease'"; and then the learned Lord Justice proceeded to point out that there was no distinction for this purpose between a contract for a sub-lease and one for the assignment of a lease. As I have already mentioned, Byrne J. uses substantially the same language in *In re Haedicke and Lipski's Contract*. (2) The case of *Hyde* v. *Warden* (3) was decided before the Conveyancing Act, 1882. The 3rd section of that Act provides that "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." That seems to me to leave the law applicable to such cases as this substantially on the same footing as before. It lays down very much the same standard as that laid down by Lord Cranworth in *Ware* v. *Lord Egmont*. (4) He used the word "gross" in conjunction with the word "negligence" as indicating the standard by which the duty to make inquiry and inspection is to be measured; and therefore, from that point of view, unless it

(1) 3 My. & K. 283; 41 R. R. 70.
(2) [1901] 2 Ch. 666.
(3) 3 Ex. D. 72.
(4) 4 D. M. & G. 460.

C. A. 1903

MOLYNEUX v. HAWTREY.

Collins M.R.

could be said that it was gross negligence by the purchaser not to inspect a document, the vendor could not rely on an opportunity having been given for inspection so as to relieve him from the onus of making disclosure. But the question whether the word "gross" is a desirable addition to the word "negligence" in this connection is not perhaps very material. The question really is whether there has been an absence of reasonable care on the part of the purchaser or his agent. The question in such cases appears to me to be whether, having regard to the particular circumstances of the case, such as the relation of the parties and their respective engagements, there has been reasonable notice by the person on whom the onus of giving notice lay, or the circumstances are such that the person to whom notice had to be given is really estopped from saying that he had not notice. Upon the facts of this case I think the evidence justified the finding of Wright J. on the point in question, and that this appeal must be dismissed.

MATHEW L.J. In this case there is no doubt that the covenants of the lease were unusual and onerous. There is also no doubt that the obligation to disclose the existence of those covenants lay on the vendor, and that the defendant was in fact ignorant of their existence; but it is said that, according to the equitable rule on the subject, knowledge of these covenants must, contrary to the fact, be imputed to the defendant. I entirely agree, if I may say so, with the view of the effect of the equitable rule as to constructive notice which was expressed by Kay L.J. in the case of *English and Scottish Mercantile Investment Co.* v. *Brunton*. (1) He said in giving judgment in that case: "I venture to say that the doctrine of constructive notice, if carefully applied and limited in the way pointed out by Wigram V.-C. and Lord Lyndhurst, is a doctrine which will never defeat the ends of justice, but will promote them always. If we were to apply it as we are asked to apply it in this case, we should not only be extending it beyond what has

(1) [1892] 2 Q. B. 700.

been laid down in any previous case, but we should be extending it beyond the limits which Lord Lyndhurst and Wigram V.-C. so carefully defined." That passage is taken from the judgment of the learned Lord Justice in a case in which the Court of Appeal was considering the proper limits within which the application of the doctrine of constructive notice ought to be confined. It was there held that, though the solicitor for the respondents, who were proposing to advance money to a company on an assignment of certain property as security, had notice of the existence of certain debentures charging property of the company, the fact that he had such notice did not affect the respondents with constructive notice of the contents of the debentures, because the solicitor had been told by a director of the company that the debentures were not secured by any trust deed which might cover the property proposed to be assigned as security. Other cases besides that case and *Ware* v. *Lord Egmont* (1) might be referred to in which judges have declined to make any extension of the equitable rule as to constructive notice beyond the limits within which it had been decided to be applicable: for instance, Lindley L.J. in *Manchester Trust* v. *Furness* (2), and Lord Herschell in *London Joint Stock Bank* v. *Simmons*. (3) In reference to the proposition that the test in such cases is whether a fair opportunity of inspection has been given, I prefer to be guided by the language of the Conveyancing Act, 1882, which provides that a purchaser shall not be prejudicially affected with notice of anything, unless it would have come to his knowledge if he had made such inquiries and inspections as ought reasonably to have been made by him. It seems to me that the effect of that enactment is very much to elucidate the principles upon which the applicability of the doctrine of constructive notice depends. Looking to the terms of the Act, the question whether the defendant must be taken to have had notice of the covenants of the lease appears to depend on whether the defendant's solicitor had such an opportunity and was placed in such a position that

(1) 4 D. M. & G. 460. (2) [1895] 2 Q. B. 539, at p. 545.
(3) [1892] A. C. 201, at p. 221.

C. A. 1903

MOLYNEUX v. HAWTREY.

Mathew L.J.

under the circumstances he ought reasonably to have made such an inquiry and inspection as would have informed him of the existence of these covenants. That comes really to be very much a question of fact. The defendant's solicitor, it appears, went to the office of the house agent acting for the plaintiff, and, in the course of conversation on the subject of the proposed assignment of the lease, asked to see the lease, thereby indicating that he was desirous of information as to the terms of it. He was told that he could not see it then, because it was deposited with other articles belonging to the plaintiff at some repository, but the house agent said that he could shew him another lease in the form which was common in the case of leases of premises forming part of the same property. The defendant's solicitor, however, appears to have in effect pointed out that it would be time enough to go into the matter later: that the negotiations were still going on and might not come to anything; and the reasonable inference from what passed is, I should say, that it was agreed that the matter should stand over. I cannot see that anything then took place which could relieve the vendor from the obligation, which was in common fairness imposed upon him, of disclosing to the defendant the unusual nature of the lease which she was purchasing. The negotiations went on, and no further effort was made on the part of the vendor, or his agent, to furnish information to the purchaser as to the terms of the lease; and the contract was ultimately entered into by the defendant without any inspection of the lease, and in ignorance of the existence of these unusual covenants. Without going through all the cases which have been referred to on the subject, the question appears to me to be whether under the circumstances a reasonable opportunity was afforded to the purchaser, by what took place, of becoming acquainted with the exceptional terms of the lease. That, as I have said, appears to me to be really a question of fact, and it seems to me to have been rightly decided by the learned judge.

COZENS-HARDY L.J. I agree that this appeal should be dismissed. I think it is quite plain, when the lease in this

case is looked at, that the covenants contained in it are unusual and onerous covenants. That being so, it is well settled, and it is common sense, that the onus is imposed on the vendor of disclosing the existence of such covenants to the purchaser. The vendor may discharge himself from that onus in several ways. He may prove that the purchaser had notice aliunde of the existence of the covenants; or he may prove that he gave express notice of them to the purchaser; or that he has handed the lease to him and that he has actually seen it; or he may shew that the events which have happened are such as to prevent the purchaser from being heard to say that he had not notice of the covenants in the lease; in other words, that something in the nature of an estoppel has taken place. I think that the doctrine of law on this subject must now be treated as being nearly, if not quite, confined within the limits contained in the 3rd section of the Conveyancing Act, 1882. Upon the terms of that section the question involved in this case appears to be what inquiry and inspection, if any, under the circumstances the purchaser, or some one on her behalf, ought reasonably to have made. The facts are these. On December 12 the house agent acting for the plaintiff, who had not got in his possession the lease of the premises in question, produced to the defendant's solicitor a lease of other premises on a printed form, which was in common use for leases of premises forming part of that estate. The defendant's solicitor appears to have said that he was busy and could not look at it then. I think he was quite right in not doing so. At that date the parties were not at one, and negotiations were still going on as to the terms of the proposed contract. It is not at all clear that the solicitor, if the contract had afterwards gone off, could have charged his client for perusing the lease at that time. I think it would be going beyond what is reasonable to say that he was bound to peruse, not the lease, but another lease said to be in similar terms, when the parties had not yet come to terms, and the occasion was not ripe for examination of the lease. I do not think that we are in any way impairing any of the authorities on the subject in holding that the defendant ought not in this case to be prejudicially affected by

C. A. 1903

MOLYNEUX v. HAWTREY.

notice of the terms of the lease, and that there was not such a reasonable opportunity given of examining it as to estop the defendant from saying that she was not aware of its contents.

Appeal dismissed.

Solicitor for plaintiff: *A. J. Schweder.*

Solicitors for defendant: *Valpy, Peckham & Chaplin.*

E. L.

C. A. 1903 *July* 15.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE POOR OF THE ORMSKIRK UNION *v.* THE GUARDIANS OF THE POOR OF THE CHORLTON UNION.

Poor Law—Settlement—Irremovability—Residence—Hospital—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1.

An institution partially endowed by a private person and founded with the object of providing a home and medical treatment, together with suitable employment and recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within the proviso to s. 1 of the Poor Removal Act, 1846.

Judgment of the Divisional Court, [1903] 1 K. B. 19, affirmed.

APPEAL from a decision of a Divisional Court upon a special case stated by consent and by order of a judge in pursuance of 12 & 13 Vict. c. 45, s. 11. (1)

The question for decision was whether one Harold Coxon, a pauper, had, on the facts stated in the special case, acquired a legal settlement in the Ormskirk Union by reason of his residence for three consecutive years in a home for epileptics situate within that union, and whether this home was a "hospital" within the meaning of the Poor Removal Act, 1846, s. 1, which provides that the time during which a person shall be "confined . . . . as a patient in a hospital" shall be excluded from the computation of the period which

(1) [1903] 1 K. B. 19.

renders a pauper irremovable. The facts stated by the special case were as follows:—

On January 10, 1902, the guardians of the poor of the Chorlton Union obtained an order of two justices of the peace for the city of Manchester adjudging the settlement of Harold Coxon, a pauper, to be in the township of Maghull in the Ormskirk Union.

On February 8, 1902, the guardians of the poor of the Ormskirk Union gave notice of appeal against the order to the general quarter sessions of the peace for the city of Manchester, and the appeal was at the said quarter sessions entered and respited.

Coxon was about twenty-four years of age, and was admitted as a patient into an institution called the Home for Epileptics at Maghull on April 4, 1893, suffering from the disease of epilepsy, for the purpose of receiving cure and treatment, and, if possible, of obtaining a cure of such disease, and he remained continuously receiving care and treatment in the home from the date of his admission until January 8, 1902, when he was discharged as incurable. Thereupon he became an inmate of the Chorlton Union workhouse. Whilst Coxon was in the home his relations paid 7*s.* 6*d.* a week for his maintenance and treatment therein. Coxon had never resided or dwelt in the Ormskirk Union for any period of time whatever during which he could acquire a settlement therein except during the period and for the purpose above mentioned.

The Home for Epileptics was established in 1888 by one Henry Cox, deceased, and was partially endowed by him with the sum of 2000*l.* It consisted of buildings, farm buildings, and five acres of land, farmed by the committee which governed the home. It was supported by donations, annual subscriptions, and payments made on behalf of the patients under treatment therein. Its object was the care and treatment of persons suffering from the disease of epilepsy. The home was situate at Maghull, a village in the country about seven miles from Liverpool, in the Ormskirk Union. The site was chosen to permit the patients to have the benefit of the hospital treatment in combination with healthy outdoor life, regular

C. A. 1903

ORMSKIRK UNION v. CHORLTON UNION.

habits, suitable employment and recreation. There was attached to the home a medical staff, a lady superintendent, three matrons, and twelve nurses. The number of patients on December 31, 1901, receiving care and treatment for epilepsy was 123. Annexed to the case was a pamphlet relating to the history and constitution of the home, and the annual report and balance-sheet for 1901. It was stated in this pamphlet that it was considered necessary that each patient should be paid for so as to make the institution as far as possible self-supporting; the patients were therefore divided into three classes, paying two guineas, one guinea, and 7*s.* 6*d.* a week respectively, with the intention that, while the third class of patients paid only for their food, the charge for the first and second class would leave a profit to defray the expenses of the establishment, nursing, &c. It appeared from the balance-sheet for 1901 that the income of the institution was 5075*l.*, of which 4157*l.* was derived from payments by patients and 238*l.* from donations and subscriptions.

The question stated for the opinion of the Court was whether or not, on the facts above set out, Coxon had acquired a legal settlement in the township of Maghull aforesaid under the provisions of s. 1 of the Poor Removal Act, 1846, and s. 34 of the Divided Parishes Act, 1876, by reason of his continuous residence for three consecutive years and upwards in the Home for Epileptics. If the Court should be of opinion in the affirmative, the order of the justices was to stand; otherwise the same was to be quashed.

The Divisional Court (Lord Alverstone C.J., and Wills and Channell JJ.) were of opinion that the home was a "hospital" within the meaning of s. 1 of the Poor Removal Act, 1846, and consequently that there were no grounds for the removal of Coxon to the Ormskirk Union workhouse, and allowed the appeal. (1) From this decision the guardians of the Chorlton Union appealed.

R. Cunningham Glen, and *Morsby White*, for the appellants. The facts of this case are not sufficient to justify a finding that

(1) [1903] 1 K. B. 19.

Coxon's residence in this institution complied with the requirements of these sections: *Guardians of Holborn* v. *Guardians of Chertsey*. (1) This home was a convenient place of residence for a person suffering from this disease, and during his residence Coxon paid for his board; in fact, no one is admitted to this institution without payment. The nature of a public hospital was considered in *Horner* v. *Lewis*. (2) This institution is a home, not a hospital; it is a place for long and permanent residence. Coxon cannot be said to have been "confined" in this home; he was under no compulsion either mental or bodily; he went there of his own free will, and continued to reside there for many years. [*St. Olave's Union* v. *Canterbury Union* (3) was referred to.] The fact that in the Act hospitals are grouped with places like prisons and lunatic asylums shews that the residence contemplated was involuntary residence; and for this reason there is a special provision in the Habitual Drunkards Act, 1879, s. 32, that the time during which a person resides in a retreat is not to be counted under s. 1 of the Poor Removal Act, 1846.

[STIRLING L.J. Because such a retreat is clearly neither a "prison" nor a "hospital."]

The character of this institution is entirely different from ordinary "hospitals": it is almost entirely supported by the payments of the patients; it is called a "home," not a "hospital," and medical treatment is not its main object.

Macmorran, K.C., and *Clavell Salter*, for the Ormskirk Union, were not called upon.

VAUGHAN WILLIAMS L.J. Everything that can be said on behalf of the appellants has been pressed upon us in this case; but in my opinion the decision of the Divisional Court is quite right. The question turns upon s. 1 of the Poor Removal Act, 1846, and what we have to decide is whether this man Coxon has been residing in this institution in such a way that his residence there comes within the proviso in that section, so as to be excluded from the computation of the period of residence

(1) (1885) 15 Q. B. D. 76. (2) (1898) 67 L. J. (Q.B.) 524.
(3) [1897] 1 Q. B. 682.

C. A. 1903

ORMSKIRK UNION v. CHORLTON UNION.

Vaughan Williams L.J.

which renders a person irremovable. In the Court below the question was argued entirely on the character of this institution; in this Court, although that point was also argued, an alternative point was also made as to the character of Coxon's residence in this institution.

I do not think it is necessary for us to define, and I certainly am not going to try to define exactly, what is or what is not a "hospital" within the meaning of this section; but in my opinion this institution comes within the term "hospital." It is true that it is called a "home," but it is a house in the country where epileptic patients are taken in for the express purpose of obtaining hospital treatment combined with such possibilities of outdoor life as would be calculated to make that treatment more effective. I cannot conceive why such an establishment is not a hospital.

I could have understood an argument that no person who is in an institution where he has to pay for his treatment is in a hospital, but it seems to me to be impossible to hold that after *Horner* v. *Lewis*. (1) I could also have understood an argument that no one is in an hospital within this section unless he is confined there against his will; but after the decision in *St. Olave's Union* v. *Canterbury Union* (2) it is impossible to come to that conclusion. I think, therefore, that the Divisional Court were right in holding that this institution was a "hospital" within the meaning of the proviso in s. 1 of the Poor Removal Act, 1846.

Then it was said that, taking the facts of this case, the proper conclusion was that Coxon was not in this institution as a patient to be treated for the disease of epilepsy, but that, being an epileptic person, he found this institution a convenient place of residence. I think that on the facts of this special case it is impossible to come to that conclusion; it appears that he remained there as a patient continuously receiving care and treatment from the date of his admission until January, 1902, when he was discharged as incurable. The appeal fails, and must be dismissed.

(1) 67 L. J. (Q.B.) 524.

(2) [1897] 1 Q. B. 682.

ROMER L.J. I am of the same opinion, and I have nothing to add.

STIRLING L.J. I agree.

Appeal dismissed.

Solicitors: *Rowcliffes, Rawle & Co., for Alfred Dickinson, Ormskirk; Gibson & Weldon, for J. H. Wilde, Manchester.*

W. C. D.

C. A. 1903

ORMSKIRK UNION *v.* CHORLTON UNION.

[IN THE COURT OF APPEAL.]

C. A. 1903 *July*, 21, 23.

DE HART *v.* COMPAÑIA ANONIMA DE SEGUROS "AURORA."

Marine Insurance — "General Average payable according to Foreign Statement" — Special Provision in Charterparty as to General Average — Foreign Law.

The plaintiff, a shipowner, effected with the defendants, underwriters, a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up." The plaintiff chartered the ship to third persons, and by the terms of the charterparty it was provided that the ship might carry a deckload of timber, and that "in case of average . . . . jettison of deck cargo for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deckload of timber, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was there made up, and the average adjuster, in accordance with the terms of the charterparty, included the jettison of deck cargo in general average. By the Belgian law, apart from contract, the jettison of deck cargo is not the subject of general average; but that law recognises any special provisions in a charterparty as to what shall be the subject of general average:—

Held, applying the rule in *Harris* v. *Scaramanga*, (1872) L. R. 7 C. P. 481, that as the statement had been made up in good faith and the charterparty imported no terms of a special and unusual character such as could not reasonably have been contemplated by the parties to the policy of insurance, the defendants, the underwriters, were bound by the statement, and were therefore liable to indemnify the plaintiff against the ship's proportion of the loss on the jettison of the deck cargo.

Decision of Kennedy J., [1903] 1 K. B. 109, affirmed.

APPEAL by the defendants from Kennedy J. (1)

The facts are sufficiently stated in the report of the case

(1) [1903] 1 K. B. 109.

C. A. 1903

DE HART v. COMPAÑIA ANONIMA DE SEGUROS "AURORA."

below. They formed the subject of joint admissions of fact made for the purpose of the action only. In the course of the argument reference was made to certain articles of the Belgian Code of Maritime Commerce, of which the following is a translation:—

Art. 100: "Failing special agreements between all parties concerned, average losses are settled according to the following regulations."

Art. 109: "Goods carried on the ship's upper deck contribute if saved. If they are jettisoned or damaged by jettisoning the owner has no claim to contribution. He can only make use of his rights against the master."

Art. 118: "The statement of losses and damages is made up by experts (average staters) in the place where the ship is discharged at the instigation of the commander. The experts are nominated by the Tribunal of Commerce if the discharge takes place in a Belgian port."

Art. 119: "The specialists nominated in accordance with the preceding article apportion the losses and damages. The apportionment becomes legally binding on approval by the tribunal."

J. A. Hamilton, K.C., and *J. R. Atkin*, for the defendants, urged the same arguments as in the Court below, and, in addition to the cases there cited, referred to *Montgomery & Co.* v. *Indemnity Mutual Marine Insurance Co.* (1)

[VAUGHAN WILLIAMS L.J. referred to *The Mary Thomas.* (2)]

Carver, K.C., and *De Hart*, for the plaintiff, cited *Strang, Steel & Co.* v. *A. Scott & Co.* (3) as an authority that deck cargoes were allowed in general average where, as in the present instance, they were permitted according to an established custom of navigation. After reading various passages from the judgments in *Harris* v. *Scaramanga* (4) to shew that the defendants were bound by the average statement prepared at Antwerp, they were stopped by the Court.

J. R. Atkin, in reply.

(1) [1902] 1 K. B. 734.
(2) [1894] P. 108.
(3) (1889) 14 App. Cas. 601, 609.
(4) L. R. 7 C. P. 481.

VAUGHAN WILLIAMS L.J., after stating the facts, proceeded:—Now, Kennedy J. decided in favour of the plaintiffs on the ground that the average statement as made up was in accordance with the Belgian law, because the Belgian law recognises in regard to general average the terms of any special contract of affreightment that the parties may have chosen to make. He also takes notice of another contention that had been made on behalf of the plaintiffs, to the effect that, having regard to the judgment of Bovill C.J. and Keating J. in *Harris* v. *Scaramanga* (1), these words in the policy of insurance, "general average payable according to foreign statement if so made up," were words which bound the underwriters, whether the foreign statement was made in accordance with the Belgian law as proved, or whether it was not; but, having noticed it, he says that it is unnecessary for him to decide whether or not that assumption or that statement of law by Bovill C.J. and Keating J. was correctly made or not. That then being the state of things, we have had to consider whether the judgment of Kennedy J. is right. I am not at all prepared to say that his judgment may not be supported upon the ground on which he has himself put it. A passage from the foreign code was read to us, from which it would appear that, according to Belgian law, if there is a special contract as between the parties who are primarily interested in the law of contribution —that is the shipowner and the cargo owner—effect is given to that special bargain in making up the foreign statement; and it is also said, with regard to the particular provision of Belgian law that a deck cargo does not come within the rules as to contribution, that that rule is subject to special agreements of the parties to the contract of affreightment. Speaking for myself, I have some doubt as to whether foreign codes are by themselves admissible as evidence of foreign law. I have always thought that the practice is for the Court not to give effect to a foreign code unless there is a foreign expert present to construe the foreign code and to assist the Court, not so much in construing the code as in arriving at the conclusion of fact at which the English Court has to arrive as to

(1) L. R. 7 C. P. 481.

C. A. 1903

DE HART v. COMPAÑIA ANONIMA DE SEGUROS "AURORA."

Vaughan Williams L.J.

what is the foreign law, by informing the Court what has been recognised by the law of the foreign country. I do not think that it is part of the duty of English judges to take a foreign code and, unassisted by foreign experts, to construe that foreign code, for that is to make the question of the foreign law a question of law and not a question of fact. I have always understood that it is a question of fact and not of law, and for that, amongst other reasons, I prefer to look and see whether the judgment of Kennedy J. can be supported upon other grounds.

Now, in the first place, I am disposed myself to support that judgment upon the law as stated in the judgment of Bovill C.J. and Keating J. in *Harris* v. *Scaramanga*. (1) In that case the paragraph in the policy is almost identical with the paragraph here, the words there being, "to pay general average as per foreign statement if so made up." Bovill C.J. says (2): "It seems to me that the general effect of the memorandum is, to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum." Then he deals with the question of the law of England and the law of Bremen, and proceeds: "It seems to me, however, that, under the terms of this policy, the underwriters and the assured have both agreed to accept the adjustment and statement of the average-stater in the foreign port, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy." And then he says (3): "It seems to me that,

(1) L. R. 7 C. P. 481. (2) L. R. 7 C. P. at p. 489.
(3) L. R. 7 C. P. at p. 490.

by the express agreement of the parties, contained in the memorandum, it is not open to us to determine it"—that is the question whether the claim was to be determined by the English Court, or by the statement of the foreign average-stater at Bremen—"and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? And how does the matter stand upon the facts as stated in the special case?"

In my opinion, so far from there being anything inconsistent with mercantile usage and mercantile convenience in so reading the clause in this policy, which is a very usual clause and one commonly adopted, I think it is in accordance with mercantile convenience. The parties primarily interested in the adjustment for the purpose of carrying into effect the rights to contribution based upon the law of general average may conveniently be left to deal with questions of contribution both in their contracts of affreightment and in other respects. If adjustment has to be effected in a foreign port, it seems to me obviously convenient that there should be an express provision that the underwriters in such a case shall stand in the shoes of the parties primarily liable. In my view of the law it is perfectly plain that in the absence of any special provision such would be the law: it would be the law without any special clause.

Then in this particular clause the words following the expression "if so made up" are, "York-Antwerp Rules, if in accordance with contract of affreightment." It is said that the effect of those latter words is that the only case in which the shipowner is to be entitled to treat the matter of contribution as affected by the contract of affreightment is in case he adopts the York-Antwerp Rules without any qualification; and it is said that the result of that in this case is that one ought to apply the Belgian law here and to give no effect whatsoever to the York-Antwerp Rules as qualified by the words of exception, and that that means one ought to go back to the simple Belgian law unqualified by this special bargain. I cannot so read these

C. A. 1903

DE HART v. COMPAÑIA ANONIMA DE SEGUROS "AURORA."

Vaughan Williams L.J.

words. I think that there is nothing at all events in these words which in the slightest degree prevents us from applying the rule laid down by Bovill C.J. and Keating J. in *Harris* v. *Scaramanga*. (1)

Taking this view of the case, it seems to me unnecessary to consider the other questions that have been raised before us. The ground of my decision is simply that I apply the rule laid down by Bovill C.J. and Keating J., and, applying that rule, I think that the underwriters here are bound by the foreign statement so made up.

It was said in this case, in addition, that we ought not to come to this conclusion having regard to the authorities, especially the following passage in the judgment of Cockburn C.J. in *Mavro* v. *Ocean Marine Insurance Co.* (2): "The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound." I quite agree, but that only means in the absence of a special bargain; and in my judgment in this particular case there was a special bargain, if this contract is properly construed, whereby the underwriters agreed to accept the average statement abroad, if so made up, as binding upon all parties. I think, therefore, the judgment of Kennedy J. must be affirmed and this appeal dismissed with costs.

ROMER L.J. I have come to the same conclusion. It is admitted by the appellants' counsel that, with regard to the clauses of the policy of insurance which are material, the general average was not to be made up according to the York-Antwerp Rules, inasmuch as, having regard to the special terms of the contract of affreightment here, which purported to incorporate these clauses with some exceptions, it could not be said that, within the meaning of this policy of insurance, the general average could, by the contract of affreightment, be made payable per York-Antwerp Rules; and the appellants' counsel rested their contention accordingly on this—that the

(1) L. R. 7 C. P. 481. (2) (1875) L. R. 10 C. P. 414.

general average ought to have been made payable according to foreign statement, whatever the term "foreign statement" may have meant in this policy of insurance.

Now there are two clauses in the policy of insurance dealing with the same subject-matter; they only differ in this, that in the clause in the body of the policy the words are, "General average payable according to foreign statement if so made up," whereas the words "if so made up" are omitted in the corresponding clause in what are called the Institute Time Clauses; but it is clear to my mind that the two clauses should be read together, and I have no hesitation, therefore, in coming to the conclusion that in this policy the foreign statement which is meant is the foreign statement if so made up. Now I think that, by agreeing that general average shall be payable according to foreign statement if so made up, the parties have in effect agreed to be bound by the foreign statement if made up as it exists in fact, subject only to two observations which I am about to make. In the first place I think that, in order to bind the parties, the statement so made up must have been made up in good faith; but it is not suggested here by the appellants that the statement has not been made up in good faith. In the second place, I should like to make a reservation for further consideration if the case I am about to mention should hereafter arise; that is to say, if the statement were made up according to the law of the port which recognised the special terms of the contract of affreightment, I doubt if the parties to the policy of insurance in a case like the present would be bound by the statement if the contract of affreightment imported terms as to general average of a special and unusual character, which could not reasonably have been contemplated by the parties to the policy of insurance. If such a case arises I should like to further consider it, but such a case does not arise here. I may point out that jettison of deck cargoes is in many cases allowable as general average—for example, by English law in the case of voyages where deck cargo is permitted by the established custom of navigation; and I may point out that in the present case the voyage was one where deck cargo was so permitted, and therefore it could

C. A. 1903

DE HART v. COMPAÑIA ANONIMA DE SEGUROS "AURORA."

Romer L.J.

not be said that the contract of affreightment, so far as it referred to deck cargoes, was of so special or unusual a character as to be outside the reasonable contemplation of the parties to the policy of insurance.

In the present case, therefore, I have no hesitation in saying that in my opinion the parties are bound by the statement, which was, in fact, made up at Antwerp, and which, to my mind, decides the rights of the parties. I agree, therefore, in thinking the appeal fails.

STIRLING L.J. I am of the same opinion. Speaking for myself, I agree with the reasoning of Kennedy J. The appellants invite us to say that the words "General average payable according to foreign statement if so made up" mean a statement made up in conformity with the foreign law. Now a statement was made up at Antwerp, which was the proper place for making it up, and what is sued for in the present case is the contribution as defined by that foreign statement. But it is said that that statement was not in accordance with the general law of Belgium, and that the words I have read ought to be treated as meaning that the general average is to be payable according to the general law of the country where it is made up, and not in accordance with any specific agreement which may be made between the parties, even if such an agreement would be recognised by that law as being valid and have effect from it accordingly. I am unable to construe these words as referring to the general law of the country. It seems to me that to do so would be giving no effect to the words "if so made up." By those words I think the parties meant in some sense or other to bind themselves to a statement actually made up in the foreign country; and the utmost it seems to me that could be introduced by way of qualification would be that, if it is not the actual statement made up by an average adjuster holding an official position there, it should be in accordance with the law of that country so as to be valid and binding in that country when made. Now, although there is no strict proof, I understand it to be admitted on behalf of the appellants that, in point of fact, the law of Belgium does recognise the

existence of special agreements as to general average, and does give effect to any contract they may contain with respect to that subject. For these reasons, which are also those of Kennedy J., I think his decision should be supported; but I also agree with what has been said by my brethren as to the effect which ought to be given to the clause.

C. A. 1903 DE HART v. COMPAÑIA ANONIMA DE SEGUROS "AURORA."

Appeal dismissed.

Solicitors: *Waltons, Johnson, Bubb & Whatton; Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-upon-Tyne.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1903 *July* 21.

CUNARD STEAMSHIP COMPANY, LIMITED *v.* MARTEN.

Insurance (Marine)—Insurance of Shipowner's Liability to Cargo Owner—Suing and Labouring Clause—Applicability.

A number of mules exceeding 20,000*l.* in value having been shipped on the plaintiffs' steamship for carriage, under a contract which contained no clause exempting the plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant and other underwriters at Lloyd's, to protect the plaintiffs against "liability of any kind to the owners of the mules up to 20,000*l.* owing to the omission of the negligence clause" from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing and labouring clause. During the voyage the vessel was stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules, and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss:—

Held, that the suing and labouring clause was inapplicable to and formed no part of the contract of insurance, and that the plaintiffs were not entitled to recover in the action.

Decision of Walton J., [1902] 2 K. B. 624, affirmed.

APPEAL from the decision of Walton J. (1)

The action was brought upon a Lloyd's policy, which the

(1) [1902] 2 K. B. 624.

C. A. 1903

CUNARD STEAMSHIP COMPANY v. MARTEN.

defendant had underwritten for 1000*l.*, to recover the defendant's proportion of expenses alleged to be recoverable under the suing and labouring clause in the policy.

The plaintiffs were the owners of the steamship *Carinthia*, and in April, 1900, they contracted with the British Government to carry on the ship 1500 mules from New Orleans to Cape Town. The contract contained no clause exempting the plaintiffs from liability for loss arising from the negligence of their servants.

The policy, dated May 9, 1900, was effected to protect the plaintiffs as owners of the ship against "liability of any kind to owners of mules $\frac{\text{and}}{\text{or}}$ cargo up to 20,000*l.*, owing to the omission of the negligence clause in contract $\frac{\text{and}}{\text{or}}$ charterparty $\frac{\text{and}}{\text{or}}$ bill of lading."

The policy was in the ordinary Lloyd's printed form, the above clause being inserted in writing.

The printed part contained the ordinary suing and labouring clause in the following terms: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

The ship sailed from New Orleans on May 11, 1900, with 1500 mules on board, their value being about 40,000*l.* On May 15, 1900, she was stranded off Hayti, owing to the negligence of the plaintiffs' servants.

Efforts were made to save the mules, and in the result more than 900 were rescued and were sent to Cape Town in another ship. The remainder were lost.

The plaintiffs in saving the 900 mules and in endeavouring to save the others incurred (as they alleged) expenses amounting to 7744*l.* 0*s.* 8*d.*, and by this action they claimed under the suing and labouring clause to recover 387*l.* 4*s.* 2*d.*, the defendant's proportion of the expenses.

Walton J. gave judgment for the defendant on the ground

that the suing and labouring clause was inapplicable to the insurance actually effected, and was no part of the contract. The learned judge recognised that a suing and labouring clause might be framed which would be appropriate to such an insurance as was effected. But any attempt to apply to that insurance a clause which was framed and intended to apply to an insurance of a different kind would work injustice, unless, in order to make the clause applicable to the insurance in question, it was so modified as to make it in fact a different clause altogether.

The plaintiffs appealed.

Pickford, K.C., and *Loehnis*, for the plaintiffs. It is submitted that the suing and labouring clause applies. The liability to the owners arises out of the loss of the mules, and that liability was diminished by the salving of the mules. That is for the benefit of the shipowners, but it is also for the benefit of the underwriters. There may be some difficulty in applying the suing and labouring clause, but that is not a reason for excluding it altogether. No doubt words in a contract may be rejected when they are absolutely inconsistent with the rest of the document, but there is no such inconsistency here. Walton J. based his judgment on two grounds—(1.) that the policy was not upon goods; (2.) that there might be a case in which the expenses incurred would be for the benefit of the assured, and not for the benefit of the underwriters. It is submitted that neither of those grounds affords a sufficient reason for excluding the suing and labouring clause. As a matter of fact, in the present case the underwriters have the whole benefit of the expenditure. The parties have agreed that the policy shall have in it a suing and labouring clause if it can be applied to the case, and there being no absurdity or inconsistency it can be applied. *Xenos* v. *Fox* (1) is distinguishable. There the "running down" clause was not a part of the policy; it was an additional contract. If the suing and labouring clause does not apply, the shipowners might

(1) (1868) L. R. 3 C. P. 630; (1869) L. R. 4 C. P. 665.

C. A. 1903

CUNARD STEAMSHIP COMPANY v. MARTEN.

incur heavy expenses which would benefit the underwriters and they would be under no liability. That could not have been the intention. If expenses are incurred which in fact benefit the underwriters, it must have been intended that they should recoup the shipowners. A contract of marine insurance ought not to be construed in a different way from other contracts. The whole of the policy must be looked at: *Cory* v. *Burr*. (1) In *Kidston* v. *Empire Marine Insurance Co.* (2) Willes J. said that expenses incurred in averting a loss for which underwriters would have been liable are within the suing and labouring clause. That applies to the present case. The plaintiffs have taken steps to diminish the liability which would be incurred by the underwriters under the policy.

[VAUGHAN WILLIAMS L.J. referred to *Paterson* v. *Harris*. (3)]

Carver, *K.C.*, and *F. D. MacKinnon*, for the defendant, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must fail and the judgment of Walton J. be affirmed.

Every one is agreed that, whatever is the subject-matter of this policy, it is plain the mules are not. Both sides agree in that. The subject-matter of the policy is—"To cover shipowner's liability of any kind to owners of mules $\frac{\text{and}}{\text{or}}$ cargo up to 20,000*l.*, owing to the omission of the negligence clause in contract $\frac{\text{and}}{\text{or}}$ charterparty $\frac{\text{and}}{\text{or}}$ bill of lading."

I do not understand the plaintiffs to say that they could recover the whole expenses which were incurred in salving the mules as a direct loss under this policy; it is because they feel the impossibility of doing that that they are obliged to have recourse to the suing and labouring clause. That being so, how does the matter stand? [The Lord Justice read the suing and labouring clause, and continued:—]

Now primâ facie, as was pointed out by Walton J., the words "said goods and merchandises" have no application to the

(1) (1881) 8 Q. B. D. 313, 315.
(2) (1866) L. R. 1 C. P. 535, at p. 552.
(3) (1861) 1 B. & S. 336; (1862) 2 B. & S. 814.

subject-matter of this policy. But it is said, although these words do not directly apply and the mules are not the subject-matter of the policy, yet by salving the mules you are really averting a liability to the owner of the mules, and therefore the suing and labouring clause applies. I do not think that one ought thus to strain the words of the policy to make them apply to this subject-matter. In my view the parties never could have intended it. The value of the mules was 40,000*l.*, and the amount insured to cover the liability to the cargo owners was 20,000*l.* In case the salvage expenses had amounted to the whole 20,000*l.* the assured would, if this argument is right, have been entitled to recover the whole of that loss, although the insurance was for only half the value of the mules. In fact, although both sides are agreed that this is not an insurance on the mules, we are invited to apply the suing and labouring clause just as if it was. I adopt in full the reasoning of Walton J., and I feel that it is impossible for me to improve upon what he said.

ROMER L.J. I also do not see my way to differ from Walton J. The point involved is a very short one. It is admitted on behalf of the appellants that this policy of insurance is not upon the mules or goods or ship at all; it is what it purports to be, solely an insurance to cover the shipowner's liability of any kind to the owners of mules or cargo up to 20,000*l.*, owing to the omission of the negligence clause in the contract of affreightment. That is the only subject-matter of the insurance, and it is inserted in a policy the printed part of which applies to an insurance on ship and goods and cargo. Naturally enough, you find that most (if not all) of the printed matter has little or no application to the precise risk insured. But it is said that one of the printed clauses can be singled out from the others and made applicable—namely, that which is commonly called the suing and labouring clause. How does it run? [The Lord Justice read the clause, and continued:—]

That clause refers to "the said goods and merchandises and ship," because, as I have said, the printed form of this policy is for an insurance on the ship and goods. Therefore the suing

C. A. 1903

CUNARD STEAMSHIP COMPANY v. MARTEN.

Romer L.J.

and labouring clause refers to "the said goods and merchandises and ship," and admittedly this insurance is not on any goods or merchandises or ship at all. Of course I would, if I could do so reasonably, apply that clause to the present case, but it appears to me that it cannot reasonably be applied to such a case. In my opinion the clause was never intended to apply to such a subject of insurance; it was on the very face of it intended to apply only to an insurance on "goods, merchandises, and ship."

STIRLING L.J. I agree, and I cannot usefully add anything.

Appeal dismissed.

Solicitors: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool; Parker, Garrett & Co.*

W. L. C.

In re SLOBODINSKY.
Ex parte MOORE.

1903
July 14, 20, 27.

Bankruptcy — Insolvent Trader — Transfer of his Business and another's to Company for Shares and Debentures—Fraudulent Assignment—Act of Bankruptcy—Notice to Company—Subsequent Transferees of Debentures—Purchasers for Value without Notice—Title of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*); *ss.* 43, 44, 49 —13 *Eliz. c.* 5.

In December, 1902, S., an insolvent trader, through the agency of N., sold and transferred his business and book debts, and also the business of M. which he had contracted to purchase, and a large quantity of stock bought on credit not in the ordinary course of business, for 35,539*l.* to a company which he promoted for that purpose. The purchase-money was paid, as to 400*l.* in cash, as to 10,000*l.* in 100 debentures of 100*l.* each of the company, and as to the balance in fully paid-up shares of the company. The debentures, at the request of N., were issued as follows—seven to B., fifteen to Z., thirty to N., thirty to M., and eighteen to S. The fully paid-up shares for the balance of the purchase-money were allotted to S., who had been appointed chairman of the board of directors. The debentures issued to N. were the remuneration for his services to S. in the matter, and B. and Z. were cash creditors of S. The first acting directors of the company and N. were the mere instruments of S. in carrying through this transaction, which divested S. of substantially the whole of his property, and left him with trade creditors to a large amount and some cash creditors totally unprovided for. M.'s business was genuine, and he acted in good faith and without notice of any fraud. He accepted the 400*l.* in cash and his debentures as payment for his business; and there were some bonâ fide shareholders of the company. Within three months S. was adjudicated bankrupt:—

Held, that the transfer of S.'s property to the company was fraudulent and an act of bankruptcy within sub-s. 1 (*b*) of s. 4 of the Bankruptcy Act, 1883; that under the circumstances the company must be taken to have had notice of the fraud; and that under ss. 43 and 44 of the Act the trustee in bankruptcy, as against the company, was entitled to the property of S:

Held, also, that under the circumstances N. was a party to the fraud, and that his debentures were not a charge upon the property of S. in the hands of the trustee:

But *held*, that M. was protected by s. 49 of the Act, and that his debentures were a charge upon the property of S. in the hands of the trustee so far as the assets of the company might prove insufficient to satisfy the same.

In January, 1903, in a debenture-holder's action, a receiver was appointed of the business of the company. Subsequently B. and Z. sold

1903

SLOBODINSKY, *In re.*
MOORE, *Ex parte.*

their debentures to X. and Y. at a heavy discount. X. and Y. were acquainted with S., and knew that he had transferred his business to the company and had become bankrupt. They also knew of the debenture-holder's action and of the appointment of the receiver, and they respectively purchased their debentures without making any inquiries:—

Held, that under the circumstances X. and Y. were put upon inquiry, and could not be said to be purchasers for value without notice, and that their debentures were not a charge upon the property of S. in the hands of the trustee.

THIS was an application by the trustee in bankruptcy to set aside a sale of the debtor's business to a company under these circumstances.

For some years prior to the transactions after mentioned J. L. Slobodinsky, the debtor, carried on the business of a wholesale and retail tobacco, cigar, and cigarette manufacturer at the leasehold premises 68, High Street, Whitechapel, and also at several other leasehold premises in London. In the autumn of 1902 he formed the project of transferring his business to a limited liability company, and one Nevill, a tobacconist in a small way of business, agreed to act as his agent in the matter. On October 27, 1902, he entered into a written contract with one Melinsky, also carrying on business as a tobacco, cigar, and cigarette manufacturer in the Minories, to purchase Melinsky's business for 4400*l.*, to be paid in cash or bills, and the purchase to be completed on December 1. During October, November, and the early part of December the debtor bought abnormal quantities of stock on credit; and on December 16 the J. L. S. Tobacco Company, Limited, was registered with a capital of 25,000*l.*, divided into shares of 1*l.* each. The registered offices of the company were 68, High Street, Whitechapel. On December 22 a meeting of the subscribers to the memorandum and articles of association of the company was held, when two resolutions (amongst others) were passed: one appointing the debtor, Nevill, Melinsky, and two persons named Felgate and Fowler, directors of the company, and the other appointing the debtor chairman of the board of directors. At this meeting the contract of October 27, 1902, and two agreements (amongst other documents), both dated December 22, 1902, were read and approved. Both

these agreements were in common form. One was made between the debtor of the one part and Nevill of the other part, and provided for the sale to Nevill of (*a*) all the debtor's leasehold premises and the benefit of the contract of October 27, 1902, for 6900*l.*, and (*b*) all the debtor's book and other debts and stock-in-trade and business at a price to be determined by valuation. This agreement also provided for completion on January 1, 1903, and contained a provision that the debtor should on or before a date (left in blank) pay all his trade and other debts; and the agreement further provided that if before January 1, 1903, Nevill should resell to a company duly formed for the purpose, he should have the option of satisfying any part of the purchase-money, not exceeding 10,000*l.*, in debentures of the company, and any part of the balance, not exceeding 22,139*l.*, in fully paid-up shares of the company at par value. The other agreement was between Nevill (as vendor) of the one part and the company of the other part, and provided for the sale by Nevill to the company of all the above property and the benefit of the contract of October 27, 1902, for 32,539*l.*, whereof 400*l.* was to be paid in cash, 10,000*l.* further part thereof by the issue to the vendor or his nominees of 100 debentures of 100*l.* each, and 22,139*l.*, the balance thereof, by the allotment and issue of 22,139 fully paid-up shares of 1*l.* each in the company; and completion was fixed for January 1. At this meeting of subscribers Messrs. Raphael & Co. were appointed solicitors of the company, and were instructed to prepare all the necessary documents for carrying the above sale into effect and vesting the whole of the property referred to in the company. Later the same day a meeting of the directors was held, Felgate and Fowler being present, when the seal of the company was affixed to the following documents, which had previously been prepared with the view of carrying the sale into effect forthwith: (1.) the agreement between Nevill and the company; (2.) an assignment of the debtor's business and book debts to the company; (3.) an assignment of Melinsky's business and book debts to the company; and (4.) the usual contract between the company and Nevill for the issue of the 22,139 shares as fully paid up, which the

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

solicitors were then instructed to register at Somerset House; and a form of debenture was submitted and approved, and a series of 100 debentures of 100*l.* each in accordance with the agreements was created. The next day, December 23, another meeting of directors was held at which Felgate and Fowler were present. At this meeting, the solicitors having reported that the contract with Nevill for the issue of the 22,139 shares as fully paid up had been duly registered, 22,139 shares were at the request of Nevill allotted and issued as fully paid up to the debtor; and 100 debentures of 100*l.* each at the like request were sealed and issued to the following persons:—

7 to one Brodsky.
15 to one Zisselman.
30 to Nevill.
30 to Melinsky.
18 to the debtor.

100

Brodsky and Zisselman were cash creditors of the debtor for money lent. The thirty debentures issued to Nevill was his remuneration for the services rendered by him to the debtor in the above transactions. The 400*l.* (part of the purchase price) was paid in cash to Melinsky, who also accepted the thirty debentures in further payment of 3000*l.* of his purchase-money, and the balance of 1000*l.* due to him was paid and included in the eighteen debentures issued to the debtor, to whom he owed 1000*l.*

The next board meeting was held on December 30, when all the five directors were present, and the minutes of the previous meetings were read and confirmed. A prospectus was approved, but was not issued to the public. About 665 shares, however, were privately subscribed. Throughout the above transactions Messrs. Raphael & Co. acted as solicitors for the debtor and for Nevill, who left everything to them. They also acted as solicitors for the company after its incorporation. The result of these transactions was to denude the debtor of substantially the whole of his property, and to leave him with some

13,800*l.* of trade creditors and also some cash creditors totally unprovided for.

On December 29 the debtor, through his said solicitors, issued a circular to his creditors convening a meeting, which was held on January 2, 1903, at which he placed his financial position before them, and made them an offer which was not accepted. One Klingenstein, a creditor, then commenced an action against the debtor and the company to set aside the sale to the company under the statute 13 Eliz. c. 5. This was followed on January 20 by Nevill and Melinsky instituting the usual debenture-holder's action against the company, and on January 22 a receiver and manager was appointed by consent, and went into possession and was carrying on the business. The company also brought an action against the debtor to rectify the contract of December 22, and to obtain the return and cancellation of the eighteen debentures and 2600 of the shares issued to the debtor, on the ground that a mistake had been made in the price. All three actions were pending when, on February 20, a receiving order was made against the debtor on a creditor's petition, founded on the circular letter of December 29; adjudication followed, and a Mr. Moore became the trustee in the bankruptcy. In the meantime Zisselman, on March 9, sold and transferred his fifteen debentures to one Bernstein for 500*l.*, and Brodsky, on March 11, sold and transferred his seven debentures to one Levartovsky for 300*l.*

The trustee in bankruptcy now claimed a declaration against the company, Nevill, Melinsky, Bernstein, and Levartovsky that the transfers of the leasehold premises, businesses, and effects comprised in the two agreements of December 22, 1902, were a device to defeat creditors, and were fraudulent either under the statute 13 Eliz. c. 5, or under s. 4, sub-s. 1 (*b*), of the Bankruptcy Act, 1883; and that he was entitled to the same properties, businesses, and premises as part of the property of the bankrupt free from any incumbrances under or by virtue of the debentures issued by the company or any of them.

It was not disputed that Melinsky's business was a genuine one, and that he had acted in good faith in accepting cash and

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

debentures from the company in payment of his purchase-money; and it did not appear that he was party to or had knowledge of any fraud on the part of the debtor. Nevill's evidence is sufficiently noticed in the arguments and judgments. Felgate and Fowler had disappeared and could not be found.

Reed, K.C., and *Wace*, for the trustee. On the evidence the transfer of the debtor's business to the company was a fraud on his creditors. The trustee does not press for a declaration under the statute of Elizabeth, as that might place difficulties in his way as regards parties claiming to be subsequent purchasers for value without notice; but as against the company the transfer was fraudulent and an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883, to which the title of the trustee relates back under s. 43, and the trustee has a higher title than the receiver in the debenture-holder's action. In the first place, the company was a sham, and the principle of *In re Hirth* (1) and *In re Wheatley* (2) applies. From the first it was intended that Melinsky's business should be sold to the company, and the whole scheme was very carefully prepared. The company was the creature of Slobodinsky, and Nevill, Fowler, and Felgate were mere dummies put in on behalf of the debtor to carry through the sale. Next, the company did not deal with the debtor in good faith. They knew that he was transferring all his assets and had debts, because in his assignment to the company he covenants to satisfy and discharge his debts. When a trader assigns the whole of his assets leaving his debts unpaid, the onus is on the transferees to shew that they are purchasers in good faith: *Ex parte Schulte* (3); *In re Jukes*. (4) They must shew that he had no debts or that he had assets to pay his debts. A company can only act by its directors. Here, the directors knew that the debtor had debts, and they made no inquiries. The company, therefore, had notice of the fraud. The creditors are not bound to accept shares or debentures for the cash due to them.

(1) [1899] 1 Q. B. 612.
(2) (1901) 85 L. T. 491.
(3) (1874) L. R. 9 Ch. 409.
(4) [1902] 2 K. B. 58.

E. C. Macnaghten, K.C., and *Kenyon Parker*, for the company. This is not a sham company like *In re Hirth* (1), which was a one man company. In that case Hirth was everything; but this is a real company with a real business consisting of the amalgamation of two businesses—the debtor's and Melinsky's. There is no evidence that Melinsky's was not a real business and a real sale. There are also some forty-seven outside shareholders who hold 665 shares between them. There is no evidence of notice by the company, quâ company, of any fraud by the debtor, assuming that he committed a fraud. The mere fact that a director or a solicitor has some knowledge is not sufficient: *In re Marseilles, &c., Co.* (2) The company could not have knowledge of fraud through the debtor, because he was the party contemplating it, and therefore would not have communicated it; and there is no evidence that Melinsky had notice of any intended fraud. There is no evidence against the company of any fraud whatever. The debentures were not gifts by the debtor, but payments either for services rendered, or property transferred, or money due by him to others.

M. Lush, K.C., and *Carrington*, for Melinsky. There is no case to answer. The onus is on the trustee to shew that the company is an alias for the debtor, and he has failed to discharge that onus. There is no trace of any knowledge by the company of any fraud. Fowler and Felgate were the original directors, and Melinsky, Nevill, and the debtor, though appointed directors, did not join the board until after the sale had been completed. Next, Melinsky had a bonâ fide business, and he agreed to sell it to the debtor, and when the company came into existence he agreed to transfer it to the company in exchange for the cash and debentures he received. He acted in good faith and without notice of any fraud, and his sale cannot be set aside. If it is, he loses everything.

Danckwerts, K.C., and *Ward Coldridge*, for Nevill.

Muir Mackenzie, for Bernstein.

E. Clayton, for Levartovsky.

Reed, K.C., in reply.

(1) [1899] 1 Q. B. 612.

(2) (1871) L. R. 7 Ch. 161.

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

WRIGHT J. I propose to deal with the main question on the motion now; not that I do not feel doubt about it, because I do, but that I do not think I am likely to change the conclusion I have formed. In the first place, it seems to me that there was very clear fraud both legal and moral on the part of the debtor. I need not go into it. He obviously formed a design, some time before this transaction was carried through, to do what was necessary to cheat his creditors by buying stock on credit not in the ordinary way of trade, beyond his means, and by putting that and his other stock out of the reach of his creditors. No doubt he thought this company with new capital and the new business brought in would be prosperous, that the shares would become valuable, and that he would be able to make money for himself and pay his creditors. Very likely he thought that; but it is a fraud for a man to go buying up large quantities of stock on credit and transferring it to a company on the chance of that sort of thing succeeding. It is clear he did damage to his creditors by what he did, because debentures and shares are no equivalent to the creditors for their debts, and the debentures will swallow up the whole of the company's assets so far as there are any beyond what was received from the debtor. Then this having been a fraudulent conveyance or transfer of the debtor's property so far as he was concerned, how does the law stand? One case which the trustee might make might be that the company was an entirely sham company, that it was really the debtor himself, and that the conveyance to the company ought not to stand inasmuch as it was in substance a conveyance to himself. I am not, however, prepared to go that length and to say that I think this was entirely a sham company. It seems to me that Melinsky's business was a genuine one, and the bonâ fide transfer of his business to the company and his presence on the board are elements that go some way to shew that there was an independent company. There are also some bonâ fide shareholders who hold some 665 shares. I think there was some prospect of the success of the company, and that it was not a mere fiction. I believe the debtor thought he would succeed, and there was a possibility that he would have suc-

ceeded but for Klingenstein's action, which I cannot understand, but which seems to have put an end to the prospects of the company. Then if it is not to be treated as entirely a sham company, the transaction must be avoided either under the doctrine represented by the statute of Elizabeth or under the Bankruptcy Act. I am not sure that I ought not to hold it void under the statute of Elizabeth; but I am not asked to deal with the case on that footing, or to say whether the burden of proof is established under that statute. The trustee relies on the Bankruptcy Act, which by s. 43 provides that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the first act of bankruptcy committed by him within the statutory period of three months; and by s. 44 his property vests in his trustee as from the date of that previous act of bankruptcy. The debtor's previous act of bankruptcy here was his assignment of December 22, which was within the statutory period. The effect of the trustee's title by relation back under s. 43 is excluded by s. 49 of the Bankruptcy Act if there has been a contract, or conveyance, or assignment for valuable consideration, provided that the transferee has not at the time notice of any available act of bankruptcy; and although the words "in good faith" do not occur in the section they must be deemed to be inserted, because in all former Acts those words have been inserted, and it has been since held that the omission was not intended to make any difference, and that the person who takes the conveyance of a debtor's property cannot claim the benefit of s. 49 if he had notice of anything wrong or anything that really put him upon inquiry. Therefore the real question comes back to this: Can this company be properly said to have known or to have had notice at the time of the fraud which the debtor was committing? I come to the conclusion that I ought to hold the company knew and had notice of it. The fraudulent debtor was himself the author of the existence of the company. He brought it into existence through himself and his agents for the very purpose of committing this fraud by means of the company. That was his sole object in bringing the company into existence. He got himself made chairman

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

Wright J.

of the board. He held nearly twenty-three twenty-fifths of all the possible shares of the company, and about 97 per cent. of all the actual issue of shares of the company; and substantially all the debentures of the company have been disposed of either to himself or his nominees. His co-directors, Nevill, Fowler, and Felgate, must have been nominees of his, because they had no interest whatever of their own. They held but one share each.

I come to the conclusion that Fowler and Felgate must have been there solely as his nominees; and that being so, the board, with the exception of Melinsky, was entirely composed of himself and his nominees, and on December 22 and 23 his nominees adopted and approved the contracts which he had prepared and had entered into. Now if all that does not amount to notice to a company, what does amount to notice to a company? The chairman knows all about it. He holds all the strings in the company and nearly all the shares. I do not know what is notice to a company if that is not. Is notice to be sent to all the shareholders that a man is going to commit a fraud? If what occurred here is not notice to a company, it is very difficult to know what is. I am rather impressed with Mr. Reed's argument that it ought to be imputed to the company or the directors (which is the same thing, I suppose) that they knew that the agreements were for the taking over of all the business and all the business assets of a trader without making any provision whatever for the payment of the debts which a trader must owe, and that under the circumstances they were put on some inquiry as to whether he did or did not owe any debts of such an amount in relation to the assets that the transfer would be a fraud on the creditors. I think that might be a good ground. But in any view I think the company must be regarded as having known and had notice of the fraud of the debtor, and that the transaction must as between the trustee and the company be set aside. Of course it must be set aside without prejudice to the rights, if any, of the debenture-holders to have some charge or security on the assets of the debtor in the hands of the trustee, and the further hearing on this point will stand over. If they have no such rights, the hardship which will result to them from setting

aside this transfer may be very great, but it cannot alter the effect of the bankruptcy laws. The company must pay the trustee's costs.

July 20. The motion now came on for further hearing. Bernstein and Levartovsky admitted on cross-examination that they were acquainted with the debtor and knew he had sold his business to the company and had become bankrupt, and that they respectively purchased their debentures without making any inquiries.

Reed, K.C., and *Wace*, for the trustee. This motion is not for a declaration against the debenture-holders, but it is contended that the company's debentures do not operate as a charge on the property of the debtor. They are a mere floating security, and only operate on the property of the company; but the debtor's property never was the property of the company, because his transfer to them was void ab initio. None of the respondents acquired their debentures in good faith and for value without notice.

M. Lush, K.C., and *Carrington*, for Melinsky. The trustee cannot claim any part of Melinsky's business under the contract of October 27, because that contract never ripened into a sale to the debtor. Melinsky really conveyed his business directly to the company and received his consideration from them. He acted in good faith, and his position is unaffected by anything that took place between the debtor and the company. His debentures are a charge on the debtor's property, and the trustee cannot touch his security. Sect. 43 is exhausted when the debtor's contract is set aside, and does not affect the vested rights of third parties. It is submitted that if a debtor is fraudulent himself and his conveyance or contract is set aside as an act of bankruptcy, yet if a third party has subsequently in good faith taken a transfer or mortgage without notice, the rights of that third party are protected. There is no direct authority on the point, but the policy of the bankruptcy laws is to protect innocent persons. Sect. 49 only deals with contracts made by the bankrupt himself. The

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

nearest cases to the present are *In re Vansittart* (1); *In re Carter and Kenderdine's Contract* (2); *Sanguinetti* v. *Stuckey's Banking Co.* (3); but they are decisions under s. 47 of the Act, which avoids voluntary settlements. The same principle should be applied here.

Muir Mackenzie, for Bernstein. There is no evidence that Bernstein had notice of any fraud, and he purchased for value and in good faith. Even if the original debenture-holder had knowledge of the fraud, a subsequent purchaser for value would under the statute of Elizabeth be protected: *George* v. *Milbanke.* (4) The principle is well stated in May on Fraudulent Conveyancing, p. 317.

E. Clayton, for Levartovsky, adopted the same line of argument, and also referred to *Morewood* v. *South Yorkshire Co.* (5), *Halifax Joint Stock Bank* v. *Gledhill* (6), s. 168 of the Bankruptcy Act, 1883, s. 23 of the Sales of Goods Act, 1893, *Cundy* v. *Lindsay* (7), and *In re Lawford and Lawrence.* (8)

Danckwerts, *K.C.*, and *Ward Coldridge*, for Nevill. Debentures are a floating charge until the holders take some step to enforce them: *Governments Stock, &c., Co.* v. *Manila Ry. Co.* (9) Here the debenture-holders took possession when the receiver was appointed on January 22. The transfer of the debtor's business was not void ab initio; it only became void because he became bankrupt within the statutory period, and in the meantime the rights of other parties had intervened. The company has been and is still carrying on business, and the trustee can only claim the actual property of the debtor that was handed over, i.e., all that remained of it on January 22. All the other assets of the company belong to the debenture-holders. Further, if the debtor's contract is void, the trustee must hand back to the company all the shares and debentures that were issued to or on behalf of the

(1) [1893] 2 Q. B. 377.
(2) [1897] 1 Ch. 776, 781.
(3) [1895] 1 Ch. 176.
(4) (1803) 9 Ves. 190; 7 R. R. 157.
(5) (1858) 3 H. & N. 798.
(6) [1891] 1 Ch. 31.
(7) (1878) 3 App. Cas. 459, 463.
(8) [1902] 2 K. B. 445.
(9) [1897] A. C. 81.

debtor. If he does not, he cannot set aside the contract. He has not got them to hand back, and therefore his remedy is gone. Nevill was not a principal, but an agent. He acted in good faith, and gave valuable consideration for his debentures, and is entitled to retain them.

E. C. Macnaghten, K.C., and *Kenyon Parker*, for the company.

Reed, K.C., in reply. Sects. 4, 43, and 44 of the Bankruptcy Act, 1883, are the only sections to be considered. If the trustee elects to avoid the debtor's contract, of course he must return the shares and debentures the debtor received; but that is not the question now before the Court. The trustee does not impute fraud to Melinsky, but insists that he has no charge on the debtor's assets, because he took his debentures after an available act of bankruptcy and without proof that he had no notice of that act of bankruptcy. Whether the debentures are honest or not is immaterial; the question is, Are they a charge on the trustee's property? It is submitted they cannot be, and that they are only a charge on what turns out to be the actual property of the company.

Cur. adv. vult.

July 27. WRIGHT J. I have held that the transfer by Slobodinsky was fraudulent and an act of bankruptcy, and that the company had notice of and was a party to the fraud and act of bankruptcy; and I have declared the transfer void as against the trustee. It remains to determine whether the estate of Slobodinsky which reverts to the trustee is subject to any claims by the persons who hold debentures of the company. As to all these persons, except Melinsky, it might be enough to say that inasmuch as the debentures are merely a general charge on the property of the company they probably do not attach to anything which turns out not to have become the property of the company; but it is desirable to consider each case with reference to the other circumstances. I will take the cases separately.

As to Melinsky. There is no imputation against him of bad faith, and so far as I can see there is no ground for any.

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

Wright J.

The transfer of his business is based on meritorious consideration. He had a valuable business and assets. His contract with Slobodinsky was made on October 27, 1902, long before the act of bankruptcy or the commencement of the trustee's title by relation back. Under this contract Slobodinsky was to pay him 4400*l.* in cash or bills by December 1. In some way not fully explained the 4400*l.* was changed into a payment of 400*l.* in cash and 3000*l.* in debentures. On the whole I think he should be regarded as having taken from Slobodinsky direct before the receiving order, and therefore he is within the protection of s. 49 if he acted bonâ fide. His business and assets were actually handed over to the company, and, although he continued to carry it on as the servant of the company, the name of the company was put up on his premises. There is nothing to shew that he knew or had notice of any act of bankruptcy on December 22, or of any element of fraud. He acted on the basis that he was entitled to have security over Slobodinsky's estate as well as his own; and I think he is so entitled against both Slobodinsky and the company. Therefore he has a charge on the proceeds, but of course he cannot have both his own estate and the price. If he gives up or is obliged to give up his estate to the company, he may rank on his debentures against Slobodinsky's estate for any deficiency which he is unable to recover from the company's assets, and the trustee's title must be declared subject to his charge for that deficiency (if any), if he elects or is obliged to affirm his sale to the company.

As to Mark Nevill. He took his debentures direct from the company on December 23, 1902, and ostensibly under the terms of one of the agreements of December 22, by which he agreed to transfer Slobodinsky's estate to the company, and was to get the debentures and shares as the purchase-money. But in making or agreeing to make that transfer he was the mere instrument of Slobodinsky. The payment by the debentures and the amount of them were fixed, not by the company, but between him and Slobodinsky, though so expressed in his agreement with the company. No real consideration moved from him to the company. The only consideration was between

him and Slobodinsky, and was the services performed by him for Slobodinsky in the promotion of the company and the negotiation for the transfer. Under these circumstances he must be regarded as having really taken from Slobodinsky, and he took after the act of bankruptcy constituted by the fraudulent assignment on December 22, and with knowledge of that assignment and of the facts from which the inference is drawn that the assignment was fraudulent and an act of bankruptcy. He admits that he understood that Slobodinsky owed some 10,000*l.*, and that Slobodinsky was handing over all his assets and was remaining solely liable for the debts. Under these circumstances it is impossible to extend to him the protection of s. 49. I should add that he rendered no real or valuable services. He was unable to explain anything done by him beyond seeing Raphael & Co., who were the solicitors of Slobodinsky and the company, and incurring about 135*l.* for costs, and getting some of the seven signatories to the memorandum. He wanted 4000*l.* and got 3000*l.*, which was simply a haul out of the company. He therefore has no charge.

As to Bernstein and Levartovsky. They are secondary alienees. They took from tainted persons, Zisselman and Brodsky, after the receiving order, and with knowledge that the debentures included Slobodinsky's estate and that he was bankrupt, and they gave much less than the face value—Bernstein 500*l.* for 1500*l.*, and Levartovsky 300*l.* for 700*l.* Under the circumstances I think the facts they knew put them on inquiry. It is contended that they are entitled to maintain their charge as being purchasers for value without notice. It is necessarily admitted that they are not within the terms of s. 49 since they did not take from Slobodinsky; but it is said that an exception from the trustee's title by relation back must be allowed on general principles to purchasers for value whether immediate or secondary. The facts which I have stated appear to be enough to dispose of any contention of that kind in this case. It may be that although s. 49 in its terms protects only those alienees who have taken immediately from the debtor, some degree of protection may be supplied on grounds of equity even

1903

SLOBODINSKY, *In re.* MOORE, *Ex parte.*

Wright J.

to secondary alienees. In case of settlements avoided under the statute of Elizabeth, or under s. 47 of the Bankruptcy Act of 1883, it has been found possible even at law to protect persons who before the occasion for avoiding a settlement has arisen have become purchasers or incumbrancers for value without notice of grounds for avoidance. There is much greater difficulty in cases like those which are now in question, where the trustee's title is established by relation back and the statute contains no applicable exception. It is, indeed, sufficient to refer to cases like *Copland* v. *Stein* (1) and *Nunes* v. *Carter* (2) in order to shew that an alienee, however innocent, was not aided at law except in the cases specified by the statutes for the time being in force. Equity, however, did not altogether refuse relief: see *Abery* v. *Williams* (3); *Collett* v. *De Gols* (4); *Latouche* v. *Lord Dunsany* (5); *Wilkes* v. *Bodington* (6); and it may be that at the present day it would be right to apply or even extend the equitable doctrine. That, however, could only be done in favour of a purchaser whose title is without stain, and certainly not in cases like those which are now in question; nor in any case could the purchaser be protected on equitable grounds to an extent beyond the real value of what he paid or gave as the consideration for his purchase: see the cases last cited. Melinsky will add his costs to any security he may have. Each of the other respondents, Nevill, Bernstein, and Levartovsky, will pay the costs of his own part of this further hearing of the motion.

Solicitors: *Trower, Still & Co.; Ralph Raphael & Co.; Sweetland & Greenhill; W. H. Lane; Hyman Isaacs & Co.*

(1) (1799) 8 T. R. 199.
(2) (1866) L. R. 1 P. C. 342, 349.
(3) (1681) 1 Vern. 27.
(4) (1734) Cas. t. Talb. 65.
(5) (1803) 1 Sch. & Lef. 137, 152.
(6) (1707) 2 Vern. 599.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1903
June 22, 23;
July 30.

SANDERSON *v.* BLYTH THEATRE COMPANY.

Practice—Costs—Jurisdiction—Alternative Defendants—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Rules of the Supreme Court, Order* LXV., *r.* 1.

In an action in the King's Bench Division, claiming relief against the defendants in the alternative, the Court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant, or to order the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff.

The latter course should be adopted when the action is tried with a jury and the judge does not think that there is "good cause" for depriving the successful defendant of costs.

Decision of Grantham J. affirmed.

APPEAL from a decision of Grantham J.

The action was brought originally against the Blyth Theatre Company alone, to recover a sum of 189*l.* 11*s.* 6*d.* for work done and materials supplied in connection with the defendants' theatre at Blyth. The statement of claim alleged that the work was done and the materials supplied at the request of the company by their agent, William Hope, the architect employed by the defendants in building the theatre. By their defence the company denied (amongst other things) that they or their agent requested the plaintiff to supply materials or do work as alleged in the statement of claim, and also set up other defences immaterial to be stated in detail. Thereupon the plaintiff took out a summons for leave to add Hope as a defendant to the action, and an order was made, dated January 29, 1902, giving the plaintiff liberty to amend the writ by adding the name of Hope as a defendant to the action, and to amend the statement of claim by claiming in the alternative against Hope the same sum as that claimed against the company, and in further alternative claiming the same sum against Hope by way of damages for breach of warranty of authority to order the work and materials, and the question of

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

costs of and incident to the application was reserved. The writ and statement of claim were amended accordingly. The company put in an amended defence, alleging that Hope had no authority to employ the plaintiff. Hope, by his defence, denied that he was the agent of the company, and set up other defences identical with those set up by the company. At the trial the jury found a verdict for the plaintiff against the company; and thereupon the judge ordered that judgment be entered for the plaintiff against the company and for the defendant Hope, and also ordered that the defendant Hope should recover against the plaintiff costs, to be ascertained, and that the plaintiff should recover costs against the defendant company, to be taxed, and also the plaintiff's taxed costs occasioned by joining the defendant Hope, including the costs which the plaintiff was adjudged to pay to the defendant Hope. The learned judge gave leave to the company to appeal from so much of the judgment as directed them to pay to the plaintiff the costs incurred by joining the defendant Hope, including the costs which the plaintiff was ordered to pay to the defendant Hope. An appeal was accordingly brought by the company, but to it the defendant Hope was not a party.

The notice of appeal asked that the order of Grantham J. might be set aside, on the ground (1.) that there was no jurisdiction to make the order; (2.) that there was no contract between the company and the plaintiff for any breach of which the liability to pay the costs would arise; (3.) that the liability of the plaintiff to pay the costs did not arise in consequence of nor was the natural result of any breach by the company of any contract between the plaintiff and the company.

Manisty, K.C., and *E. Shortt*, for the theatre company. It is submitted that the learned judge had no jurisdiction to order the company to pay to the plaintiff the costs which he had to pay to Hope.

[ROMER L.J. Such an order is constantly made in the Chancery Division.]

But it has never before been made on the common law side. The learned judge considered he could make the order under the

Rules of the Supreme Court, Order LXV., r. 1—which provides that "where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order"—on the ground that the company had failed as between themselves and Hope.

[ROMER L.J. The practice of the old Court of Chancery was not directly to make an order for costs between co-defendants, but to order the plaintiff to pay the one defendant's costs and to add them to his own against the other defendant; that is, to have them over against the other defendant. But since the Judicature Act it has been the habit of the Court to order the one defendant to pay costs to the other direct: *Rudow* v. *Great Britain Mutual Life Assurance Society*. (1)]

Here the verdict was for the plaintiff against the theatre company only, and therefore the company were liable to pay the plaintiff his costs as against them: *Child* v. *Stenning* (2); *Williams* v. *Burrell* (3); but it is submitted that the learned judge was wrong in holding that those cases applied as regards Hope's costs. The plaintiff's right of action as against Hope was an independent right as against an agent who had exceeded his authority: *Collen* v. *Wright*. (4) Having failed in this independent cause of action as against Hope, the plaintiff is liable for Hope's costs, and can only pass on that liability to the theatre company under some supposed contractual liability by way of indemnity.

[VAUGHAN WILLIAMS L.J. referred to *Hammond* v. *Bussey* (5), where a representation was made by contract as to the quality of coal sold by the defendants to the plaintiffs, and the plaintiffs sold the coal to purchasers; the plaintiffs, in an action for breach of contract, recovered as "damages" the costs incurred by them in another action brought against them by the purchasers of the coal from them.]

That was a case of representation by the contract, just as in *Collen* v. *Wright*. (6)

(1) (1881) 17 Ch. D. 600.
(2) (1879) 11 Ch. D. 82, 86.
(3) (1845) 1 C. B. 402.
(4) (1857) 8 E. & B. 647, 657-8.
(5) (1887) 20 Q. B. D. 79.
(6) 8 E. & B. 647.

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

[STIRLING L.J. Order LXV., r. 1, says that, subject to the provisions of the Judicature Acts and the rules, costs "shall be in the discretion of the Court or judge."]

Sect. 5 of the Judicature Act, 1890, also gives the Court a wide discretion; but the rule must be taken to refer to costs incurred by the plaintiff or defendant, as the case may be. Here Hope's costs are not costs "incurred" by the plaintiff in prosecuting his independent claim against the theatre company, but only costs which he has been "ordered" to pay. The plaintiff applied to join another defendant, merely as a second string to his bow, and not for the purpose of prosecuting his claim against the theatre company.

[VAUGHAN WILLIAMS L.J. Could not the plaintiff join Hope as a defendant under Order XVI., r. 4, and was he not therefore a proper party?]

Complete justice could have been done if the theatre company had been the only defendants.

[ROMER L.J. In *Bennetts & Co.* v. *McIlwraith & Co.* (1), where an action was brought in the first instance against agents, the plaintiffs were allowed to add the principals as defendants.]

That was because the cause of action arose out of the same transaction. If a plaintiff adds another defendant in order to assist himself, he does so at his own risk as to costs. Here the plaintiff, for his own convenience, chose to join Hope as a defendant. In Admiralty cases, where the real issue is between two defendants, the unsuccessful defendant is ordered to pay the costs of the other: *Green* v. *Goodyear* (2); but that rule does not apply here. This action really comprises two separate proceedings—not one proceeding—against separate defendants. Costs can only be ordered as between the parties between whom the issue lies, as in the case of permitting inspection under Order L., r. 3: *Shaw* v. *Smith.* (3)

No doubt the power conferred by s. 5 of the Act of 1890 is very wide, as is shewn by *In re Fisher* (4), but it is expressly

(1) [1896] 2 Q. B. 464.
(2) (1884) Note to *The River Lagan*, (1888) 6 Asp. M. L. C. (N.S.) 281.
(3) (1886) 18 Q. B. D. 193.
(4) [1894] 1 Ch. 450.

subject to the rules of Court. There must be some limitation of this wide power. The words are wide enough to empower the Court to order a witness to pay costs, but it is clear the Court would not do that. Hope was added as a party for the convenience of the plaintiff, and an additional burden should not be imposed on the theatre company. The Court will not add a defendant when to do so would injure the plaintiff: *McCheane* v. *Gyles* (*No.* 2). (1) It is submitted that there is no jurisdiction under the circumstances of the present case to order the company to pay the costs of Hope. The principle of *Shaw* v. *Smith* (2) and *Brown* v. *Watkins* (3) applies. When there is no issue between parties the Court has no jurisdiction.

Scott Fox, K.C., and *H. Drysdale Woodcock*, for the plaintiff. The notice of appeal is only on the ground that there was no jurisdiction under the circumstances to make the order; nothing is said in it about a wrong exercise of the judge's discretion.

It is submitted that the Court has jurisdiction, if it thinks fit, to order the costs of any party to an action to be paid by any other party, except when the action is tried by a jury. Of course, the rule does not apply to a witness. The costs which the plaintiff had to pay to Hope were really incurred at the instance of the company, because they denied his agency, and they ought to pay those costs. The only real question is that of jurisdiction, and *Child* v. *Stenning* (4) shews that there was jurisdiction.

[VAUGHAN WILLIAMS L.J. referred to *Cotterell* v. *Jones*. (5)]

Though the causes of action against the two defendants were different, they were combined in one action to save expense. This was the proper course to adopt: *Honduras Inter-Oceanic Ry. Co.* v. *Tucker* (6); *Massey* v. *Heynes* (7); *Bennetts & Co.* v. *McIlwraith & Co.* (8) The old practice in Chancery was well settled that a defendant might be ordered to pay to the plaintiff the costs of a co-defendant which the plaintiff had been ordered to pay in the first instance: *Parkes* v.

(1) [1902] 1 Ch. 911.
(2) 18 Q. B. D. 193.
(3) (1885) 16 Q. B. D. 125.
(4) 11 Ch. D. 82.
(5) (1851) 11 C. B. 713.
(6) (1877) 2 Ex. D. 301.
(7) (1888) 21 Q. B. D. 330.
(8) [1896] 2 Q. B. 464.

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

White (1); *Jones* v. *Lewis*. (2) But now the Court can order a defendant directly to pay the costs of a co-defendant: *Rudow* v. *Great Britain Mutual Life Assurance Society* (3); Daniell's Chancery Practice, 7th ed. p. 980. Or the defendant Hope might have been deprived of costs for "good cause": *Bostock* v. *Ramsey Urban District Council*. (4) Hope was properly made a party, and the company did not appeal from the order which authorized his being added. The suit was properly constituted, and then the Court had jurisdiction to say how the costs were to be borne.

Manisty, K.C., in reply. The action having been tried by a jury, the judge, under Order LXV., r. 1, had no discretion as to the costs. The costs must follow the event, unless for good cause the judge thought fit to deprive the defendant Hope of costs. This the judge might have done, but he did not. These costs were not incurred by the plaintiff in the action.

Cur. adv. vult.

July 30. VAUGHAN WILLIAMS L.J. The judgments which are about to be delivered by my learned brothers will express the judgment of the Court. I will add a few observations presently.

ROMER L.J. read the following judgment:—This action, seeking relief in the alternative against the two defendants, was rightly brought under Order XVI., r. 4: see *Honduras Inter-Oceanic Ry. Co.* v. *Tucker* (5) and *Bennetts & Co.* v. *McIlwraith & Co.* (6) The rule is a beneficial one, and a plaintiff who rightly brings such an action as the present ought not to be mulcted in costs by reason of his taking advantage of the rule in a proper case. Under the Judicature Act, 1890, s. 5, and Order LXV., r. 1, the Court has full power over the costs of all parties of such an action; and, in my opinion, it has jurisdiction to order the plaintiff to pay the costs of the defendant against whom the action fails, and to add those

(1) (1805) 11 Ves. 209.
(2) (1786) 1 Cox, 199.
(3) 17 Ch. D. 600.
(4) [1900] 2 Q. B. 616.
(5) 2 Ex. D. 301.
(6) [1896] 2 Q. B. 464.

costs to his own to be paid by the defendant against whom the action has succeeded, and whose conduct has necessitated the action. This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant. See, by way of illustration, *Child* v. *Stenning* (1), where it will be seen, on looking into the facts of that case, that Jessel M.R. (2) made exactly such an order as I have been indicating. The modern practice, in order to avoid circuity, has been in such cases, where there has been no jury, to order the unsuccessful defendant to pay directly to the successful defendant his costs: see *Rudow* v. *Great Britain Mutual Life Assurance Society*. (3) But of course a judge has jurisdiction to follow the old practice if he thinks fit to do so, and ought to do so when necessary, as, for example, when, having regard to Order LXV., r. 1, difficulties would otherwise arise by reason of the trial being with a jury. I think, therefore, that in the present case Grantham J. had jurisdiction to make the order he did. Of course, in exercising the jurisdiction, a judge should have regard to the circumstances of the case, and be satisfied that it is just that the unsuccessful defendant should, either directly or indirectly, have to pay the costs of the successful defendant. In the present case I do not think that I myself should have given to the defendant Hope, having regard to his defences and conduct, any costs whatever, either as against the plaintiff or co-defendant. But I do not think it is open to the appellant on this appeal to go into the question whether the defendant Hope should have been paid his costs, for the following reasons. No doubt at the trial the plaintiff did not question Hope's right to costs. But the question as to costs was adjourned. At the adjournment Hope was not present, but the appellant company were

(1) 11 Ch. D. 82. (2) 11 Ch. D. at p. 87.
(3) 17 Ch. D. 600, 607, 608.

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

Romer L.J.

present. If the company had taken the point that Hope ought not to have had his costs, Hope could have been brought before the Court again and the matter fully argued and decided. But the company did not raise the point, and I think they and the plaintiff must be taken to have agreed that there was no "good cause" shewn for depriving Hope of costs under Order LXV., r. 1. The only point argued by the company was that the Court had no jurisdiction to add Hope's costs to the plaintiff's, and in that way to order the company to pay them; and I think it is too late now for the company to argue that the defendant Hope never ought to have had his costs provided for as they have been. I think, moreover, that the leave to appeal was given on the question of jurisdiction only, and this view is borne out by the notice of appeal, and by the fact that the defendant Hope is not before this Court. And, lastly, with regard to the suggestion that the costs of Hope have been made to include costs of the issues on which he failed, I need only say that the taxation of those costs was in the presence of the company, and that it is too late now to question the amount taxed.

STIRLING L.J. read a judgment, in which, after stating the facts as above, he continued:—The first and most important question to be considered is whether the learned judge had jurisdiction to make the order appealed from.

Order LXV., r. 1, so far as material, is as follows: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge . . . . provided . . . . that, where any action . . . . is tried with a jury, the costs shall follow the event, unless the judge by whom such action . . . . is tried, or the Court, shall, for good cause, otherwise order."

The Judicature Act of 1890, s. 5, provides as follows: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, ... the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the Court or judge, and the Court or judge shall

have full power to determine by whom and to what extent such costs are to be paid."

If the action had been tried by a judge without a jury the costs would have been entirely in the discretion of the judge, and he would have had power in the exercise of his discretion to order the defendant company first to pay to the plaintiff the costs occasioned to him by joining Hope as a defendant, and, secondly, to pay to the defendant Hope his costs of the action. Inasmuch as the action was tried by a jury, the costs of the defendant Hope had to follow the event, and the plaintiff, having failed as against Hope, was bound to pay his costs, unless the judge for good cause otherwise ordered. As the learned judge did not otherwise order, it must be taken, for the purpose of dealing with the question of jurisdiction, that good cause did not exist. It must also be taken that the learned judge was of opinion that, as between Hope and the defendant company, the costs of the former ought to be borne by the latter, and the question is whether he had jurisdiction to give effect to this opinion by making the order which he did make.

The defendant Hope was made a defendant under the powers conferred by Order XVI., rr. 7 and 11. The former rule provides that, "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may . . . . join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." Previously to the Judicature Act, 1873, there was no power to join two persons as defendants in this way, either at law or in equity, but under the present rules it has been held that an action in such a form as the present is one capable of being maintained, and that any defendant to such an action is a proper party to it: see *Honduras Inter-Oceanic Ry. Co.* v. *Tucker* (1); *Massey* v. *Heynes*. (2) Questions, however, of a similar kind to that now under consideration arose and had to be dealt with by the Court of Chancery prior to the Judicature Act, 1873, for it was the rule of that Court that all persons materially interested

(1) 2 Ex. D. 301. (2) 21 Q. B. D. 330.

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

Stirling L.J.

in the subject-matter of the suit ought in general to be made parties as plaintiffs or defendants, so that the Court might be enabled to do complete justice by deciding upon and settling the rights of all persons interested: see Mitford on Pleading, p. 164. Order LXV., r. 27, regulation 37, directs that the rules, orders, and practice of any Court whose jurisdiction has been transferred to the High Court of Justice relating to costs existing prior to the commencement of the Judicature Act, 1873, shall, in so far as they are not inconsistent with the principal Act and the rules, remain in force and be applicable to costs of the same or analogous proceedings. The mode, therefore, in which the Court of Chancery dealt with the costs of defendants to Chancery suits affords an analogy which, in my opinion, ought to guide the Court on the present occasion.

Now in suits where persons were made defendants for the purpose of complying with the rule just stated, the Court of Chancery had full jurisdiction, when disposing of a suit on its merits, to deal with the costs of such parties and to decide by whom they should be borne. If the Court was of opinion that their costs ought to be borne by a co-defendant, the ordinary practice was to direct the plaintiff to pay them in the first instance, and then to add them to his own, and to have them over against the defendant who was to bear them: see, for example, *Blenkinsopp* v. *Blenkinsopp*. (1) Where, however, a suit was instituted by the Attorney-General ex officio, the practice was different, for, as the Attorney-General could not be ordered to pay costs, costs were ordered to be paid directly by one defendant to another: see *Attorney-General* v. *Corporation of Chester*. (2) After the Judicature Acts came into operation this practice was altered by the Court of Appeal in *Rudow* v. *Great Britain Mutual Life Assurance Society* (3), and it was laid down that the proper form of order was to order the defendant liable to costs as between himself and his co-defendant to pay them to the co-defendant. Jessel M.R. said that the machinery which had been adopted by the Court of Chancery was no longer either necessary or useful, but was

(1) (1850) 12 Beav. 568, at p. 588. (2) (1851) 14 Beav. 338.
(3) 17 Ch. D. 600, 607, 608, 610.

mischievous. I understand this to mean that it was no longer necessary, because under the Judicature Acts and rules the Court had full power to order one defendant to pay costs to another, and that it was mischievous because the plaintiff who was ordered to pay costs in the first instance, and then to have them over against a defendant, ran the risk of losing them if the defendant proved to be insolvent. The change of practice appears to me, if I may be allowed to say so, to be perfectly proper, and I think that the new practice ought to be adhered to wherever it is practicable to do so. It appears to me that this practice is not applicable to a case in which a judge holds that there is not good cause to deprive a defendant of costs against the plaintiff under the last clause of Order LXV., r. 1, and yet is of opinion that the costs so occasioned ought properly to be borne by another defendant. In that state of things it seems to me that, for the attainment of justice, recourse may and ought to be had to the old practice.

It is to be observed that when the Court of Chancery ordered the costs of one defendant to be paid by the plaintiff and added to his own, and the whole to be borne by another defendant, the Court was not giving substantive relief by way of indemnity or damages or otherwise, but was simply exercising its jurisdiction over the costs of a pending suit. This particular form of order was, as Jessel M.R. calls it, "machinery" for properly disposing of the costs, and this is shewn by the change in the form of order when, as in the case of the Attorney-General, the plaintiff could not be ordered to pay costs. Having regard to this and to the express directions of Order LXV., r. 27, regulation 37, I think that the term "costs" in s. 5 of the Judicature Act, 1890, ought to be read as including costs which a particular party may be ordered to pay in the first instance and then to have over against another.

For these reasons I think that the learned judge had jurisdiction to make such an order as he has made.

It is said, however, that the learned judge did not properly exercise the jurisdiction. To this there appear to me to be two answers. In the first place it is well settled that the Court of Appeal will not review the discretion of the judge of first

C. A. 1903

SANDERSON v. BLYTH THEATRE COMPANY.

Stirling L.J.

instance, even although he has given leave to appeal, unless there has been a disregard of principle or a misapprehension of facts: see *In re Gilbert* (1); *Young* v. *Thomas*. (2) In the present case I am not satisfied of the existence of either. Secondly, the defendant Hope has not been made a party to the present appeal, and in his absence it appears to me to be impossible to do complete justice.

For these reasons I think that the appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. I concur in the judgments of my learned brethren, because I think there is jurisdiction under the old Chancery practice for ordering recoupment of costs directed to be paid by another litigant. It may be necessary to exercise this jurisdiction in a case like the present, where there are claims against alternative defendants, and the issues are tried by a jury. But generally I think that under the Judicature Act this jurisdiction should only be exercised in exceptional cases; and in the present case I cannot help doubting whether the learned judge had present to his mind either the question whether he ought to deprive Hope of costs or whether, as between Hope and the theatre company, the company ought to pay Hope's costs, or whether the defence and conduct of the company were not reasonable and proper having regard to the statements made to the company by Hope, their architect. The result does not seem to me very satisfactory, but I suppose it cannot be helped.

Appeal dismissed.

Solicitors: *J. E. & H. Scott, for W. Charlton, Blyth; Gibson & Weldon, for Hannay & Hannay, South Shields.*

(1) (1885) 28 Ch. D. 549. (2) [1892] 2 Ch. 134.

W. L. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
July 2, 3, 4; *Aug.* 11.

GLAMORGAN COAL COMPANY, LIMITED, AND OTHERS *v.* SOUTH WALES MINERS' FEDERATION AND OTHERS.

Cause of Action—Interference with Legal Right—Procuring Breach of Contract—Conspiracy—Malicious Intention—Justification—Trade Union—"Stop-day."

An intentional interference with the legal right of another person, e.g., the procuring of the breach of a contract with him, is an actionable wrong, unless there be sufficient justification for the interference.

The circumstances which will constitute sufficient justification cannot be satisfactorily defined, and it must be left to the determination of the Court in each case whether there is sufficient justification for the interference.

Per Romer L.J.: In analyzing or considering the circumstances regard may be had to the nature of the contract broken; the position of the parties to it; the grounds for the breach; the means employed to procure it; the relation of the person who procures the breach to the person who breaks the contract; and the object in procuring the breach. In the case of a contract between master and servant it is not sufficient for the person who procures a breach by the servant to shew that he had no personal animus against the master, or that it was to the interest of himself and the servant that the contract should be broken.

Per Vaughan Williams L.J.: In the case of an intentional interference with the contractual rights of other persons there is a legal presumption of malice on the part of the interferer; but he may rebut the presumption by proof of circumstances raising a duty on his part to advise a breach of the contract. The person injured by the breach may, however, neutralize the proof of a duty by shewing express malice on the part of the adviser.

The miners employed at the collieries in South Wales, without giving notice to their employers and in breach of their contracts with them, abstained from working on certain days, called "stop-days." In so doing the miners acted (as the majority of the Court held) under the direction or order of a federation of the miners, given by their executive council. The object of procuring this breach of contract was to keep up the price of coal, upon which the amount of the miners' wages depended.

In an action by the employers against the federation and their officers:—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting),

C. A.
1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

that the defendants were liable in damages, there being no sufficient justification for their interference.

Held, by Vaughan Williams L.J., that the defendants only advised the breach of the contract, and that there was sufficient justification for their action in the duty which they owed to the miners.

Decision of Bigham J., [1903] 1 K. B. 118, reversed.

APPEAL by the plaintiffs from the decision of Bigham J. (1)

The action was brought by the Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen employed in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative the plaintiffs sued the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The plaintiffs claimed both damages and an injunction.

The defence consisted of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse. The trial of the action was commenced with a special jury; but ultimately the jury was discharged, and all questions of law and fact, as well as the ascertainment of the damages, if any, were by consent left to the determination of the learned judge.

The facts were thus stated by the learned judge in his written judgment: "The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. The defendants are, first, the men's federation, a body registered under the Friendly Societies Acts; secondly, the trustees of the federation; thirdly, Mr. Brace (the vice-president), Mr. Onions (the treasurer), and Mr. Richards (the secretary of the federation); and, lastly, six men who are members of the executive council of the federa-

(1) [1903] 1 K. B. 118.

tion, and who are also members of the workmen's half of a body known as the joint sliding scale committee. The trustees were joined as defendants merely in order to enable the plaintiffs to reach the funds of the federation in the event of a judgment being recovered for damages against that body. It appears that for the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement, called the sliding scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal—that is to say, as the price of that coal rises or falls so the rate of wages moves up or down. It is thus to the interest, not only of the masters, but also of the men, to keep up the price of coal, but, at the same time, not to drive it up to such a point as will unduly interfere with the demand. Against the producers of coal there are always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of these men is, of course, to keep down prices, so that they may buy as cheaply as possible. They frequently sell large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which will make their bargains remunerative. This has the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men have tried together to devise some scheme to so regulate the output of the mines, by means of stop-days or otherwise, as to counteract this effect. There has, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing has been done. On April 1, 1898, a strike broke out in the South Wales district, and the collieries were closed from that date to August 31. On September 1 work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

a joint committee of masters and men should be formed, which should be called the joint sliding scale committee; and that it should be comprised of twelve masters, representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of this committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions in addition to the provision for the formation of the joint committee, but it is only necessary to refer to one of them—clause 23 of the embodied sliding scale agreement, which is as follows: 'It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month.' Although only forty-seven of the plaintiffs were parties to that agreement and were alone to be represented on the joint sliding scale committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On October 11, 1898, the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They number about 128,000, and they include all, or very nearly all, the men who work for the plaintiffs. The members at once proceeded to elect a president, a vice-president, a treasurer, and a secretary. They also elected an executive council, consisting of twenty-five men, who were to manage the affairs of the federation. The federation was subsequently—namely, in February, 1899—registered under the Friendly Societies Acts. By its rules its objects are declared to be to provide funds to carry on the business of the federation; to take into consideration the question of trade and wages; to protect workmen generally, and regulate the relations between them and employers; and to call conferences to deal with questions

affecting the workmen of a trade wage and legislative character. On November 5, 1898, the executive council met and resolved, 'That this council in its entirety shall from time to time transact the whole of the business arising out of the sliding scale agreement, notwithstanding that only twelve of the said council can appear before the employers to deal with the sliding scale joint committee,' and, having passed this resolution, they then proceeded to elect twelve of their own body to serve on the joint committee. The forty-seven plaintiff companies objected to this election upon the ground that the council represented all the miners in South Wales, whereas the joint committee was to be composed only of the representatives of the forty-seven firms, and of the men who worked for those firms. Thereupon another election was held, at which only the men in the collieries of the forty-seven firms voted. They, however, chose the same twelve men as had been chosen by the executive council, so that the masters took nothing by their objection. The effect of this was, in my opinion, that the twelve working-men who formed the working-men's half of the joint sliding scale committee, became the mere mouthpiece of the federation, and took their instructions from the council of the federation, of which, as I have said, they were all members.

"The federation prospered greatly, so that by the end of 1900 it found itself in the possession of funds amounting to 100,000*l.* The price of coals also rose, and with it the rate of wages. But in October or November, 1900, the council of the federation seemed to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. It is at this season of the year that foreign Governments and others make their contracts for forward delivery of coal, and the prices at which these contracts were being effected alarmed the council, and foreshadowed a fall in prices. Whether the fear was well founded or not I cannot say, but I am satisfied by the evidence that it was honestly felt. On November 5, 1900, Mr. Abraham, M.P., the president, made a speech at a meeting of the council of the federation from which I take the following passage: 'There is an attempt being made by

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

middlemen and merchants to bring about an undue reduction in the price of coal; 80 per cent. of the employers are trying to counteract this movement, but three or four large firms appear to desire that it should be successful. I therefore suggest that steps be taken to bring about a stop-day throughout the coalfield as a protest against this action.' Thereupon a resolution of the council was passed ordering a stop-day for Friday, November 9, and a further resolution was passed, that a general conference of the federation should be convened for November 12. In the meanwhile the following manifesto was ordered to be circulated: 'Fellow Workmen,—Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organized attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interest of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coalfield by all colliery workmen on Friday next, November 9, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial Hall on Monday next, November 12, 1900, to consider and determine our future policy, as embodied in the following resolution: That the conference hereby authorizes the council to declare a general holiday at any time they think it necessary for the protection of our wages and the industry generally.—W. Abraham.' This manifesto had the desired effect, and on November 9 all the colliers in the coalfield, including the men working in the plaintiffs' collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of November 6. This stoppage on November 9 is the first matter of which the plaintiffs complain in this action. On November 12, 1900, the conference which had been convened for that day was held, and at it a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary

for the protection of wages and of the industry generally. Having regard to what happened twelve months later, and to the present contentions of the federation, this resolution, which was passed by the conference in compliance with the request of the executive council in their manifesto, is of considerable importance. The representatives of the masters on the joint sliding scale committee were annoyed at the course which the executive council had adopted, and on November 13, 1900, they held a meeting at which the workingmen's representatives on the committee were present. The latter assured the masters that the action of the council had not been taken with a view to injuring the owners, or to interfering with the relations between owners and workmen, but only to shew middlemen that they were not to be allowed to do with the markets what they had done in the past. This assurance the masters accepted, recording their acceptance in a memorandum in the minute-book of the joint sliding scale committee. The memorandum is as follows: 'That, whilst accepting the assurances of the workmen's representatives that they thought they were acting for the good of the coal trade in having ordered a general stoppage of work at the collieries on Friday last, the owners' representatives are unanimously of opinion that the principle involved in such a stoppage is unsound, and the action is illegal, and will not achieve the object which the workmen's representatives apparently had in mind, and the owners' representatives protest against the course followed, for, so far from assisting the trade, such action is calculated to damage it, both temporarily and permanently. And, further, the owners' representatives are of opinion that the stoppage having been in contravention of all established customs at the collieries and so far-reaching in its effects, the general body of the associated owners will have to be consulted upon the course which the workmen have seen fit to adopt.' On November 28 the associated owners met, and, after negativing the expediency of prosecuting the men, resolved as follows: 'That the owners' side of the sliding scale committee point out to the workmen's representatives that a resolution has been passed by the association

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

that, if the men make any future illegal stoppage, the owners will take proceedings against the men.' Thus this incident was closed; and, if nothing further had happened, I am satisfied that it would have been forgotten. I wish to say of it that I think the masters were right in accepting the assurances of the men. I am quite satisfied that in ordering the stop-day the federation acted as they thought in the best interest of the men, and without any intention, malicious or otherwise, of injuring the plaintiffs.

"I must now deal with the events which led up to the ordering of the other stop-days, in October and November, 1901, of which the plaintiffs complain. It is necessary to consider them with some care, inasmuch as the federation by their counsel allege that they did not order these stop-days, and that they could not therefore be held responsible for them. In this connection it is to be remembered that on July 22, 1901, the House of Lords had decided in the *Taff Vale Case* (1) that a friendly society could be sued, and its funds reached, to answer any damages that might be recovered against it. On October 12, 1901, the defendant Brace, the vice-president of the federation, made a speech to the miners, in which, after congratulating them on the flourishing position of the federation finances, he insisted that unless some steps were taken to prevent the depression of prices, which was likely to result from what he called the cut-throat competition in the trade, the workmen's wages would be seriously diminished; and in this connection he referred to the low prices at which contracts for coal had recently been made. He concluded by saying that 'if there was the slightest tendency to a slump in prices, brought about by unfair competition, the executive council of the federation, in whom power was invested by the whole of the workmen, according to the conference resolution, would immediately declare a series of stoppages, with a view to regulating the supply according to the demand.' Four days later, on October 16, 1901, Brace made another speech, in which, referring to his speech of October 12, he intimated that if a stop was ordered it would not be by the federation,

(1) [1901] A. C. 426.

but by the workmen themselves. On October 19 the defendant Richards, the secretary of the federation, made a speech to a body of miners, in which, referring to the possibility of a stop-day being ordered, he said that the executive council would have to move carefully, in view of the decision of the House of Lords in the *Taff Vale Case* (1), and that, if any notice of a stop was found necessary for the purpose of keeping up wages, it would come from the sliding scale committee. About the same time, on October 18, 1901, the defendant Onions, the treasurer of the federation, made a speech, in which, after observing upon the comparatively low prices at which some large contracts for coal had recently been made, he stated that some general action would have to be resorted to by the workmen to protect themselves, and that, in the face of the recent decision in the *Taff Vale Case* (1), they would have to exercise great care. 'It would be better,' he added, 'to take some action to save themselves now than to be compelled later on, when wages had been reduced to starvation point, to take drastic measures.' These speeches preceded a meeting of the executive council of the federation, which was held on October 23, 1901, and they foreshadowed what was to be done at the meeting. The federation, or its officers, obviously desired that one or more stop-days should be declared, but, having regard to the decision in the *Taff Vale Case* (1), they desired that the order for the stop-days should be issued by some other body than their own—by some body which had no funds with which to answer any judgment that might be recovered in the event of the order turning out to constitute an actionable wrong.

"At the meeting of the executive council held on October 23, 1901, there were twenty-two members present, ten of them being also members of the working-men's division of the joint sliding scale committee. The vice-president, Brace, and the treasurer, Onions, were there. Brace appears to have called attention to several contracts for forward delivery of coal which had been made at many shillings below the average price as ascertained at the last sliding scale audit, and thereupon

(1) [1901] A. C. 426.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

a discussion ensued as to whether the federation should take steps to counteract the bad effect of these contracts. Then it seems to have been moved that the executive council should not take upon itself the responsibility of declaring any stop-day; and to that an amendment was proposed that, if any stop-days were to be ordered, the orders should be issued by the executive council of the federation, no other body having authority to do so. The amendment being put, only three voted for it, while nineteen voted for the original motion. Thus it stood recorded on the minute-book of the federation that the council of the federation should take no responsibility for ordering stop-days. Immediately after this vote had been taken all the members of the council who were not members of the sliding scale committee left the room; and the remainder, by some process not explained, resolved themselves into the working-men's half of the sliding joint scale committee, and proceeded in that capacity to declare two stop-days—October 25 and 26, 1901—and thereupon the following manifesto was published: 'To the workmen employed at the South Wales and Monmouthshire Collieries. It having come to the knowledge of your representatives upon the sliding scale committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and fearing the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next. (Signed) W. Brace, Alfred Onions, Enoch Morel, Thomas Evans, D. Watts Morgan, C. B. Stanton, Thomas Thomas, D. D. Beynon, Daronwy Isaac, Evan Thomas, Thomas Richards.' Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop-days had been declared. It is of importance to observe that with many of these collieries the sliding scale committee, as a committee, had no concern; for that committee only represented the forty-seven firms before mentioned, and the working-men's representatives on the committee were elected only by the men working in the collieries of those firms. Yet the committee took upon

themselves to do that which the federation alone had authority to do—namely, to order stop-days in all the collieries in South Wales. One other fact: the cost of printing the manifesto and of sending out the telegrams was paid out of the funds of the federation, and the organization of the federation was used for the purpose of making the stop-days known to the men throughout the district. Subsequently two other stop-days were ordered, one for October 31 and one for November 6. They were also declared at meetings of what was called the working-men's half of the sliding scale committee; but, as before, communications to the men were distributed by means of the organization of the federation, and the cost was defrayed out of the federation funds. The result of all this was that the men stayed away from work on the four days, and so broke their contracts with the masters. It was argued on behalf of the federation that they, the federation, could not be held responsible for the consequences of stop-days, for the reason that the federation had expressly refused to meddle in the matter, as appeared by the resolution of October 23. I do not, however, think this argument well founded. It is true that the hand of the working-men's representation on the sliding scale committee was made to appear as directing these stop-days, but I cannot doubt that the hand was guided and controlled by the federation itself. In truth, it was the federation who were acting, the name of the sliding scale committee being used as a blind—a very transparent blind—to conceal what was being done.

"The writ in the action was issued on November 22, 1901. After the writ was issued Evan Thomas, one of the defendants and a prominent official of the federation, speaking at a meeting of miners upon the question as to how the stop-days would affect the right of hauliers to a certain bonus payable to them by the masters, said, 'When a stop-day is declared, it is expected that every one will morally abide by it, but if the hauliers do not they are in a sense acting disloyally towards the federation, and it will certainly mean that the executive council will either have to give this policy up or to do something else to meet the difficulty of carrying this policy out.' It is true that within

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

two or three days of this speech being reported Evan Thomas wrote to the newspapers to say that he had used the expression 'executive council' by a slip, and that he ought to have said sliding scale committee. But, for my part, I think this officer made no slip at all, and that he was quite right when he attributed the stop-day policy to the executive council of the federation.

"A number of witnesses were called on the part of the plaintiffs and on the part of the defendants. Mr. Dalziel, secretary of the owners' association, stated that he did not suggest that in giving the advice to stop in November, 1900, there was any intention of injuring the masters, and the resolution of the masters passed on November 13 confirms Mr. Dalziel in that view. Then it appears that in October, 1901, circumstances similar to those that led up to the stoppage in 1900 again occurred, and that these circumstances afforded the only reason for ordering the stop-days in October and November, 1901. There was no quarrel between the masters and the men, and, so far as I can see, no illwill. The men objected to the course of business adopted by the middlemen, and in this objection some, at least, of the masters seem to have shared. The evidence satisfies me that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop-days. Having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly, and without malice of any kind against the plaintiffs.

"I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and given. If followed, it in-

volved, as the defendants knew, the breaking of the subsisting contracts. It was followed, as the defendants wished it should be, and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing."

This statement of facts was accepted by the plaintiffs as correct, except that they did not admit that there was a request by the men for advice or direction so far as related to the "stop-day" in 1900.

The learned judge said that in his opinion the circumstances disclosed no cause of action. In all the cases cited in which the action had been for damages for procuring the breach of a contract, the element of actual malice—a real intention to harm the plaintiff—had been regarded as essential. In the present case he found that the federation and all the other defendants had acted honestly and without malice, and, in ordering the stop-days, had done no more than that which they conceived to be in the best interest of the men whom they represented and for whom they were acting. He found, moreover, that they had lawful justification or excuse for what they did in this—that, having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and their right to give the advice and to do what might be necessary to secure that the advice should be followed.

As to the cause of action founded on conspiracy, the learned judge said that an actionable conspiracy existed when a number of men combined either to do an unlawful act or to do a lawful act by unlawful means. In his opinion the acts of the individual defendants were not unlawful, and there was good authority for saying that a combination entered into for the purpose of doing a lawful act could not constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff, and must cause him damage. Here no such conspiracy ever in fact existed, for there never was any malicious intention. The learned

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

judge accordingly gave judgment for the defendants on both branches of the plaintiffs' claim.

The plaintiffs appealed.

Sir E. Clarke, K.C., B. Francis-Williams, K.C., Montague Lush, K.C., and *Trevor Lewis*, for the plaintiffs. Accepting the learned judge's finding of the facts, it is submitted that his decision upon the law was erroneous. He apparently confused two distinct classes of authorities. It is contended that the facts as found by him bring the case within the decision in *Lumley* v. *Gye*. (1) He found that the federation ordered the stop-days. They were clothed with authority over the men, and they maliciously, i.e., with knowledge that the men had entered into contracts with the employers, ordered the men to break them. The judgment of Crompton J. in *Lumley* v. *Gye* (1) exactly applies. He said (2) that it is clear law "that a person who, wrongfully and maliciously, or, *which is the same thing, with notice,* interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, ... whereby the master is injured, commits a wrongful act for which he is responsible at law." Bigham J. had in his mind that class of cases of which *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) is an instance, in which the defendants were acting within their legal rights, though what they did had the effect of injuring the plaintiffs.

In *Read* v. *Friendly Society of Operative Stonemasons, &c.* (4), this Court followed *Lumley* v. *Gye* (1), and the opinion of Lord Watson in *Allen* v. *Flood*. (5) If a man tries to persuade another to break his contract, it does not follow that he will succeed in so doing, but, if he does succeed, he has "procured" the breaking of the contract, and is liable for a tort, if the other party to the contract is injured. In the present case all the essential conditions of a right of action are to be found—(1.) existence of contracts; (2.) knowledge of

(1) (1853) 2 E. & B. 216.
(2) 2 E. & B. at p. 224.
(3) [1892] A. C. 25.
(4) [1902] 2 K. B. 732.
(5) [1898] A. C. 1, at p. 96.

their existence; (3.) intention to procure a breach; (4.) a breach to the injury of the employers.

The questions for decision are: (1.) Did the federation procure the breaking of the contracts? (2.) If they did, had they just cause for doing so? A trade union is an entity. An essential part of its constitution is that the men are controlled by the executive council. Here the order to stop work was really given by the council, and the men obeyed. It is not like the case suggested of advice given by a father to his child to break his contract. The federation, as they said, wished to teach the middlemen a lesson, and they thought the best way of doing that was to procure a breach by the men of their contracts by means of stop-days. They used unlawful means to effect their purpose, and in this respect the case differs from the *Mogul Case*. (1) Bigham J. thought it was not enough to shew an intentional procuring of a violation of a contractual right, but that a bad motive must also be shewn. It is submitted that an intentional procuring of a violation of a contractual right is an actionable wrong whatever the motive may be: *Lumley* v. *Gye*. (2)

[VAUGHAN WILLIAMS L.J. Suppose a person who is not a party to a contract has an interest in it in common with a contracting party, and these two persons consult together and agree that the best course would be to break the contract. Would *Lumley* v. *Gye* (2) apply to such a case?]

If there is a "procuring" of a breach of contract, the existence of a common interest is irrelevant. Of course the existence of a common interest may be material in ascertaining whether there has been a "procuring" of a breach of contract.

It is not denied that there may be "just cause" for procuring a breach of contract, but the nature of the wrong must be considered. Suppose my neighbour contracts with a builder to pull down my house. The pulling down of my house without my consent would be a violation of my legal right, and there would be "good cause" for my procuring the builder to break his contract.

[STIRLING L.J. In *Read* v. *Friendly Society of Operative*

(1) [1892] A. C. 25. (2) 2 E. & B. 216.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Stonemasons, &c. (1), the point which created a difficulty in my mind is not referred to in the report. According to the rules of the society in that case very short notice to determine the contract might have been given—a day's notice, I think—and I doubted whether anything illegal had been done. So in the present case notice might have been given by the men.]

They did not wish to terminate the contracts. They wanted to leave off work and to return to it as they pleased. There can be no justification for procuring the breach of a contract unless that contract is in itself a violation of a legal right. If the injury is the direct consequence of the breach of contract, the good motive of the person who procured the breach cannot be a defence to him. It would not be a defence to an action against the man who broke his contract: how can it be a defence to the association which consists of the men?

In holding that a malicious motive is a necessary part of the cause of action, Bigham J. was really departing from *Allen* v. *Flood* (2) and *Quinn* v. *Leathem* (3) as well as from *Lumley* v. *Gye*. (4) A bad motive cannot make that which is legal an actionable wrong, nor can a good motive make that which is illegal right. Yet the latter is the basis of the judgment of Bigham J. In so holding the learned judge was departing from *Lumley* v. *Gye* (4), and that case was referred to with approval by Lord Macnaghten in *Quinn* v. *Leathem*. (5) Procuring a violation of a legal right is an actionable wrong independently of motive. That, indeed, was the view taken by the federation themselves, for, for that very reason, they endeavoured to place the responsibility upon the sliding scale committee. The costs were paid out of the funds of the federation. The federation were the efficient cause of the violation of the masters' legal rights, and their funds ought to be made responsible for the injury done to the masters. The individual men would not be able to answer the damages.

Rufus Isaacs, K.C., *Holman Gregory*, and *Clement Edwards*, for the federation and their trustees. The ground on which

(1) [1902] 2 K. B. 732.
(2) [1898] A. C. 1.
(3) [1901] A. C. 495.
(4) 2 E. & B. 216.
(5) [1901] A. C. 495, at p. 510.

Bigham J. really based his decision has not been dealt with by the appellants. The learned judge held that the defendants were acting in the discharge of a duty imposed on them and in pursuance of a right, and that there was good cause for their interference. The question arises whether the mere knowledge of a man that he is inducing another to commit a breach of his contract with a third person is sufficient to give that third person a cause of action against the first. It is submitted that there is no authority for the proposition that the mere inducing another to encroach upon the legal right of a third person is an actionable wrong. The real question is, What is a sufficient justification? It is not contended that the absence of malice is alone a sufficient justification. Nor is it contended that the federation did not induce that state of mind which led the men to stop work. But it is submitted that the federation are not responsible for what the men did. The procuring of a breach of contract is no doubt an actionable wrong if it is done without just cause—without sufficient justification. Mere knowledge that you are inducing a breach of contract is not enough to give a cause of action, for the interference may be with just cause. To give a right of action, there must be an absence of just cause for the interference. The decision in *Lumley* v. *Gye* (1) has been misconceived. It is only an authority for the proposition that maliciously procuring a breach of contract is an actionable wrong. The question remains whether the procuring of the breach was malicious. The intentional procuring of a wrongful act without just cause may be malicious. *Lumley* v. *Gye* (1) was decided upon demurrer to the plaintiffs' declaration, and the decision was only that the declaration was good. In the passage in the judgment of Crompton J. which is relied upon (2) the learned judge was dealing with the question of harbouring a servant, and his language has no application to the point which arises here. And the proposition with which Crompton J. (3) sums up his judgment does not go as far as is necessary for the present plaintiffs.

(1) 2 E. & B. 216. (2) 2 E. & B. at p. 224.
(3) 2 E. & B. at p. 231.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

The question whether there is just cause or excuse for the interference of the third person is analogous to the question of "privilege" in actions for libel or slander. Except *Read* v. *Friendly Society of Operative Stonemasons* (1) there is no case in which the question of "just cause" has been dealt with. In *Bowen* v. *Hall* (2) only *Lumley* v. *Gye* (3) was dealt with, and the definition there given of "malice" cannot now stand. In the *Mogul Case* (4) Bowen L.J. referred to the question of "just cause," but it was left at large. That was not a case of inducing a breach of contract. But the existence of the qualification "just cause" was admitted. And as to "just cause," vide Bowen L.J. (5), inducing a person to break his contract is not actionable if there is "just cause" for the inducement. But, if illegal acts are committed, that would give a cause of action. The *Mogul Case* was much considered in *Allen* v. *Flood* (6), but no attempt was made to lay down any general principle as to "just cause."

It is submitted that "just cause" in cases of this kind stands on the same footing as does "privilege" in a libel action. There is malice in law and malice in fact. Malice in law is assumed, but malice in fact has to be proved to get rid of privilege: *Emmens* v. *Pottle* (7); *Vizetelly* v. *Mudie's Select Library*. (8)

[VAUGHAN WILLIAMS L.J. The ground of the decision in *Emmens* v. *Pottle* (7) was that the libel was not published by the defendant; it was only innocently disseminated.]

If in a libel action the plaintiff, notwithstanding the privilege of the defendant, can prove express malice—malice in fact—there is a good cause of action.

[VAUGHAN WILLIAMS L.J. Privilege negatives the presumption of malice, and the plaintiff must then prove actual malice.]

The existence of a duty or a common interest confers privilege, unless it is rebutted by proof of express malice:

(1) [1902] 2 K. B. 732.
(2) (1881) 6 Q. B. D. 333.
(3) 2 E. & B. 216.
(4) (1889) 23 Q. B. D. 598, at pp. 613, 614.
(5) 23 Q. B. D. at p. 618.
(6) [1898] A. C. 1.
(7) (1885) 16 Q. B. D. 354.
(8) [1900] 2 Q. B. 170.

Odgers on Libel, 3rd ed. pp. 221–223; *Stuart* v. *Bell*. (1) The same test ought to be applied in the present case. The defendants had a duty to perform, and there was a common interest. The persons who acted had been appointed for the purpose of advising or directing the men. There is no question of indirect motive; whatever the defendants did they did honestly and peaceably.

[ROMER L.J. I think the learned judge found that there was something more than persuasion.]

Assuming that the defendants procured the breach of contract, still it is submitted that the plaintiffs have no cause of action. Coercion or intimidation is not of itself illegal and does not give a cause of action: *Allen* v. *Flood* (2), per Lord Herschell.

[VAUGHAN WILLIAMS L.J. Can there be "just cause or excuse" for the use of illegal means to procure a breach of a legal right? The decision in *Quinn* v. *Leathem* (3) was based on the use of illegal means; there was a combination to do an illegal thing.]

Allen v. *Flood* (4) shews that motive is immaterial upon the question whether there is a cause of action. *Quinn* v. *Leathem* (3) has no application to the present case. To induce or procure a breach of contract is not illegal unless it is done without just cause. If I persuade a man to break his contract without the use of illegal means, I am not liable to an action by the other party to the contract if I had just cause or excuse for what I did. This view is borne out by *Read* v. *Friendly Society of Operative Stonemasons*. (5) The ground of the decision of Bigham J. was the existence of a duty and a common interest, and that the defendants acted honestly.

There may be a duty to advise the breaking of a contract. Under some circumstances it might be the duty of a father to advise his daughter to break a contract of marriage into which she had entered, and the existence of the relation of parent and child would render this advice not an actionable wrong.

(1) [1891] 2 Q. B. 341, 349.
(2) [1898] A. C. at p. 129.
(3) [1901] A. C. 495.
(4) [1898] A. C. 1.
(5) [1902] 2 K. B. 88, 732.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

So in the present case the relation between the defendants and the men must be taken into account. To give rise to a cause of action there must be something illegal done apart from the breach of contract itself, otherwise there never could be a "just cause or excuse." The mere procuring of the breach of contract cannot be included among the "illegal means" of which Collins M.R. spoke in *Read* v. *Friendly Society of Operative Stonemasons*. (1) If an act is lawful when done by one person it must be equally lawful if done by two or more in combination, unless there is a malicious intent to injure the person affected by the act. In the present case there was no malicious intent towards the plaintiffs; there was no threat. There was no act directed against the employers. Collins M.R. did not say that there was a cause of action because there was a combination to procure a breach of contract. The degree of the relationship between the parties cannot affect the propositions of law laid down by Collins M.R.

[VAUGHAN WILLIAMS L.J. There must be such a relationship between the person who is induced to break his contract and the person who induces him as to negative the presumption of malice as against the latter.]

The wages of the men depended on the price of coal, and it was to their interest that the price should be kept up, and it was the duty of the federation to do what they could to keep up the price.

[STIRLING L.J. Notice to terminate the men's contracts might have been given to the masters.]

But if the proper notice had been given the opportunity for keeping up the price of coal might have gone by.

The defendants only gave advice to the men; it was their duty to give the advice, and it cannot make any difference whether the men had or had not requested the advice. The resolution of November 12, 1900, empowered the executive council to do the very thing which they afterwards did. One of the main objects of the federation was to keep up the price of coal for the benefit of the men, and thus the necessary relationship existed. There was no attempt to coerce the

(1) [1902] 2 K. B. at p. 737.

employers. There being the relation which gave rise to the duty, the only question is whether it was honestly carried out. It is immaterial whether the action was wise or judicious.

A corporation cannot be responsible for the motives of those who are acting as its agents; the federation can be made responsible only because those who act as its agents are so acting.

[ROMER L.J. In *Allen* v. *Flood* (1) Lord Watson said that a person who procures the act of another "will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong"; and Lord Macnaghten used similar language.]

That would apply to the case of parent and child. The learned judge has found, as facts, that all the defendants were acting (1.) in pursuance of their duty, and (2.) honestly in the interests of the federation. If, the learned judge said, there was no actionable wrong by one of the defendants, then there was none by the others. The question of conspiracy is irrelevant. The only argument is, whether there was a cause of action for wrong done by one or by several. The decision in *Quinn* v. *Leathem* (2) was based upon a malicious intent to injure; and that is the question to be considered here: see also *Youde* v. *Manchester and District Bill Posting Co.* (3) Unless express malice can be shewn, there can be no cause of action; and the learned judge has found that there was no actual malice.

S. T. Evans, K.C., and *Bailhache*, for the other defendants. It is unnecessary to repeat the argument recently urged before this Court on behalf of the defendants in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*. (4) The defendants claim the benefit of that argument, and also of the argument on behalf of the federation in the present case. These defendants have not brought themselves within the "actionable wrong" for which a person can be held liable according to the definition by Lord Watson

(1) [1898] A. C. at p. 96.
(2) [1901] A. C. 495, 500-1, 505, 508, 510, 511, 512.
(3) *The Times*, June 19, 1903.
(4) (1903) 19 Times L. R. 708.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

in *Allen* v. *Flood*. (1) It cannot be said that what was done by these nine defendants was done "for their own ends": what they did was done for those for whom they were acting—that is to say, for their constituents.

[VAUGHAN WILLIAMS L.J. What was the "end" in *Read* v. *Friendly Society of Operative Stonemasons*? (2)]

It was to defeat the plaintiff's purpose of becoming a stonemason. The end was illegal, the object illegal, and the means illegal. If the means taken are illegal, it is unnecessary to inquire whether what was done was done with just cause or excuse. It is submitted that the learned judge was right in holding that there was just cause and excuse here, and that it was the duty of these nine defendants to do what they did, holding the views they did hold, namely, that the action of the middlemen at Cardiff was such as to injure the coal trade—the interest not only of the men, but also of the masters themselves. These nine defendants are miners' agents or leaders, whose express object is to look after the interests of the men. It has been found that they acted honestly, and they have not been guilty of any tort, for their acts have not been done without just cause or excuse. It is submitted, therefore, that the decision of the learned judge was right.

Sir Edward Clarke, K.C., in reply.

Cur. adv. vult.

Aug. 11. The following judgments were read:—

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment in favour of the defendants delivered by Bigham J. sitting as judge of fact and law. The action is brought by the Glamorgan Coal Company, Limited, and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of the members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative, the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously con-

(1) [1898] A. C. 1, 96. (2) [1902] 2 K. B. 88.

spiring together to do the acts complained of. The conspiracy count is put this way: The defendant federation, by its agents, its executive council, and the other defendants (naming them), well knowing the terms and conditions of the contracts of service with the workmen, wrongfully, unlawfully, and maliciously conspired together to do the acts complained of, that is, to procure the workmen to break their contracts of service by taking holidays, called stop-days. The plaintiffs claim both damages and an injunction. The defence of the defendants really consists of a traverse which, in the old days of pleading, would have taken the form of "Not guilty," but in these days of modern pleading assumes the form of an argumentative traverse; for the defendants, after denying the material allegations in the statement of claim, say that the acts complained of, if done at all, were done with reasonable justification and excuse. The defence thus pleaded is applied by the defendants both to the claim for procuring the plaintiffs' workmen to break their contracts and also to the claim for conspiracy. The learned judge began his judgment with a statement of facts shewing the relations of the colliery proprietors and their workmen. [The Lord Justice read from the statement of facts above given, and continued:—]

The learned judge then, in finding the facts of the case, in effect finds that the stop-days must be attributed to the executive council of the South Wales Miners' Federation, and that the acts complained of in the statement of claim were the acts of that executive council, and not of those members of the joint sliding scale committee of the masters and men who represented the men, which was the view of the evidence contended for on behalf of the defendants at the trial. The learned judge also said that the evidence satisfied him that the action of the federation and of the other defendants in 1901 was dictated by an honest desire to forward the interest of the workmen, and was not in any sense prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop-days. The learned judge said (1): "Having

(1) [1903] 1 K. B. at p. 128.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Vaughan Williams L.J.

been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs." The learned judge made a statement substantially to the same effect when dealing with the law in his judgment. (1) Sir Edward Clarke, in his argument on this appeal, accepted the whole of the facts thus stated, excepting that he did not admit the request by the men for advice or direction so far as it relates to the "stop-day" in 1900; but this seems to me of no importance, since the request is only material, if at all, to raise a duty, and the duty of the federation seems to me to be just as much raised by their constitution and by the resolution of November 5, 1898. The judgment of the learned judge, so far as concerns the procuring the breaches of contract by the men, is based on the duty of the executive council towards the men affording a justification for the interference by the executive council between the masters and the men, and the interruption by the executive council of the existing contractual rights of the masters against the men, and he disposes of the claim for conspiracy on the same grounds. This decision of Bigham J. does not, of course, involve any such proposition as that the workmen have a right to break the contracts entered into by them respectively because each one of them may think honestly that it is either for his individual advantage, or for the advantage of the workmen collectively, that the contracts should be broken. Each workman will, of course, be liable to be sued for his own breach of contract. The question is whether an action will lie for procuring a breach of contract or for conspiracy. Taken in its simplest form, the question would be whether, if a hundred men in the same employ agreed that they would each of them with the same object break their respective contracts on a given day, an action would lie, either

(1) [1903] 1 K. B. at p. 135.

against each of them for procuring breaches of contract by the others, or against the hundred collectively for conspiracy, or whether it could be said that there was anything in the relation of the men one to another which negatived an action in the form of an action for procuring a breach of contract, or an action for conspiracy, in a case in which that which was agreed to be done, or to do which the combination was formed, was undoubtedly a wrongful act, for which each one could be sued for breach of his own personal contract. It seems to me that if these primâ facie causes of action, arising for procuring a breach of contract or combining to procure it, do not lie, it must be either on the ground that community of interest excludes a procuring each of the other connected by community of interest, or because the relation of the parties, whoever they are, raises a duty to counsel one another and arrange for concerted action. Some such proposition would cover the instances suggested by the learned judge and by counsel in argument, such as a brother advising a sister, or a parent a child, or a doctor a patient, or a solicitor a client, but the principle is the same in each case, and the question must be the same in each case—Is the relation such as to raise the duty? In each of those cases the person breaking the contract is not the agent of the person giving the advice, however influential the adviser may be. The action for procuring a breach of contract is an action for wrongfully interfering in the contractual relations of other persons. The effect, if any, of the duty or right arising from the relation is only that it negatives the primâ facie presumption of malice which the law supposes from interference with the contractual rights between the parties to a contract of which the interferer has notice; and the defendant can always rebut the primâ facie presumption thus arising by the proof of circumstances raising a duty to advise; but the plaintiff on his part can neutralize this by proof of express malice. In no other sense is it true to say that, in an action for procuring a breach of contract, it is necessary to prove malice or motive, or anything more than mere notice of the contract. I think that similar observations arise on conspiracy; for, primâ facie, a combination to

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Vaughan Williams L.J.

interfere with the civil rights of another, whether it be his right to full freedom in disposal of his own labour or his own capital or any other right of citizenship, is an unlawful combination, because such interference, if carried into effect, is an actionable wrong, and it is this fact, and not any mere malicious motive, which constitutes the combination a conspiracy. This primâ facie wrongful interference may be negatived by shewing that the exercise of the defendants' own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others, and such interference gives no cause of action. In such a case there will be intentional procurement of a violation of individual rights, contractual or other, but just cause for it, as being done for the maintenance of the equal civil rights of the defendants. This is what I understand Sir William Erle meant by the last words of the passage from his book quoted by Lord Brampton, delivering his opinion in *Quinn* v. *Leathem* (1): "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others," or, as Darling J. puts it in *Read* v. *Friendly Society of Operative Stonemasons* (2): "I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves." I cannot but think that what was said by Bowen L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3), "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it," applies to cases where the procurement of the violation of the individual contractual right constitutes the cause of action, whether it be for a

(1) [1901] A. C. at p. 525. (2) [1902] 2 K. B. 88, at p. 96.
(3) 23 Q. B. D. 598, at p. 614.

conspiracy to violate the contractual right of another or an action against several persons for procuring a breach of such contractual right, or indeed an action for the same cause against one having a duty to advise. I think the same of Lord Macnaghten's observation in *Quinn* v. *Leathem* (1): "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." In the present case the primâ facie actionable wrong is the interference with the contractual rights of the plaintiffs, and the question is whether there is such sufficient justification for the defendants' interference as to exclude an action for procuring a breach of contract or for conspiracy. To say that the means employed by the defendants were illegal, because of the breach of contract, seems to me to be arguing in a circle; and I dissent from the contention of the appellants, that just cause for interference is excluded in cases where the advice actually given is to break a contract, and in consequence the contract is broken. It seems to me in the result that the only question in this case is whether the interference of the defendants was justified, and not whether the men individually could justify the breaches of contract, which of course they could not. I doubt very much whether an action would have lain against the aggregation of individual men for procuring the several breaches of contract, because I think there is a good deal to be said for the proposition that the community of interest of all these men following the same occupation in the South Wales coalfields entitled them to confer and act in concert, without rendering themselves liable to actions for procuring breaches of contract by one another or for conspiracy. But the case is very much complicated by the existence of the federation, which, according to the decision in the *Taff Vale Case* (2), is a thing which can own property, which can employ servants, and which can inflict injury, to which the Legislature has impliedly given the power to sue, and on which the Legislature has imposed the liability to be sued for injuries purposely done by

(1) [1901] A. C. 495, at p. 510. (2) [1901] A. C. 426.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Vaughan Williams L.J.

its authority and procurement. I do not think that such a body is entitled to rely upon a defence based on its absolute identity with the aggregate of individual members who happen to constitute the union. If such absolute identity existed it would follow that the union would be responsible for the aggregate damages resulting from the aggregate breaches of contract, and no action for procuring breaches of contract, or for conspiracy, would be necessary. But, whatever may be the identity of the federation and the men, it seems impossible in any action for breach of contract merely, and nothing else, brought against the federation, as the collective forensic name of the men, to sign a judgment against the federation, because the federation are not parties to the contract which has been broken. It follows that, if the federation is liable at all, it must be either in an action for procuring breaches of contract or conspiracy, and in either form of action there is a primâ facie case against the federation, and the federation, being a separate entity from the men, must shew some sufficient justification for their interference. The federation and the members of their council who are defendants seek to base this justification on the suggestion that their relation to the men raises a duty on their part to advise the men, or, at all events, negatives their being mere meddlers. It was argued before us that the defendants were not mere advisers, but that they were actors who did the very thing complained of, in that they issued the notices ordering the stop-days, and compelled reluctant men to break their contracts by staying away from work without giving proper notices to their employers, and that the view of the federation was that men who refused to stay away would be guilty of disloyalty to the federation; but this argument does not convince me that the federation were not acting as advisers, nor does the fact that the federation actually issued the notices deprive the defendants of their character of advisers. It is not suggested in this case that the men stayed away from work under threats, intimidation, or physical compulsion. I think, therefore, the judgment of Bigham J. must be affirmed for the reasons given by him. I do not myself think that the ineffectiveness of the remedy

by suing the men for breaches of contract is as complete as supposed; but, whether it is or not, it cannot affect the question of the liability of the defendants. I concur strongly in the advice of Bigham J. to the parties to end this litigation if they can, so that in the future nothing may happen which may prejudice the very existence of the sliding scale, which in the view of both masters and men has worked so well to produce wholesome relations between them. I regret to say that my brethren do not agree in the conclusions at which I have arrived; but the case is obviously one raising questions of great difficulty, and I thought it my duty to express my individual opinion upon the case.

ROMER L.J. The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly and comprehensively stated. In *Quinn* v. *Leathem* (1) Lord Macnaghten said: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." And in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2) Bowen L.J. included in what is forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." But although, in my judgment, there is no doubt as to the law, yet I fully recognise that considerable difficulties may arise in applying it to the circumstances of any particular case. When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was "sufficient justification or just cause" for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification," and most attempts to do so would probably be mischievous. I certainly shall not make the attempt. In particular I do not think it necessary or useful to discuss the point as to how far the question of justification can be assimilated to the question

(1) [1901] A. C. 495, at p. 510. (2) 23 Q. B. D. 598, at p. 614.

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Romer L.J.

of malice in cases of libel and slander. As Collins M.R. said in *Read* v. *Friendly Society of Operative Stonemasons* (1), "It is not at all necessary in this case to embark upon the question whether 'without just cause' is a complete equivalent for what was meant in the common law by 'malice.' I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion." I respectfully agree with what Bowen L.J. said in the *Mogul Case* (2), when considering the difficulty that might arise whether there was sufficient justification or not: "The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell." I will only add that, in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach. But, though I deprecate the attempt to define justification, I think it right to express my opinion on certain points in connection with breaches of contract procured where the contract is one of master and servant. In my opinion, a defendant sued for knowingly procuring such a breach is not justified of necessity merely by his shewing that he had no personal animus against the employer, or that it was to the advantage or interest of both the defendant and the workman that the contract should be broken. I take the following simple case to illustrate my view. If A. wants to get a specially good workman, who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not, in my opinion, afford A. a defence to an action against him by B. that he could establish he had no personal animus against B., and that it was both to the interest of himself and of the workman that the contract with B. should be broken. I think that the principle involved

(1) [1902] 2 K. B. 732, at p. 739. (2) 23 Q. B. D. 598, at p. 618.

in this simple case, taken by me by way of illustration, really governs the present case. For it is to be remembered that what A. has to justify is his action, not as between him and the workman, but as regards the employer B. And, if I proceed to apply the law I have stated to the circumstances of the present case, what do I find? On the findings of fact it is to my mind clear that the defendants, the federation, procured the men to break their contracts with the plaintiffs—so that I need not consider how the question would have stood if what the federation had done had been merely to advise the men, or if the men, after taking advice, had arranged between themselves to break their contracts, and the federation had merely notified the men's intentions to the plaintiffs. The federation did more than advise. They acted, and by their agents actually procured the men to leave their work and break their contracts. In short, it was the federation who caused the injury to the plaintiffs. This was practically admitted before us by the counsel for the federation, and, indeed, such an admission could not, in my opinion, be avoided, having regard to the facts stated by the learned judge in his judgment. And it is not disputed that the federation acted as they did knowingly. So that the only question which remains is one of justification. Now the justification urged is that it was thought, and I will assume for this purpose rightly thought, to be in the interest of the men that they should leave their work in order to keep up the price of coal on which the amount of wages of the men depended. As to this, I can only say that to my mind the ground alleged affords no justification for the conduct of the federation towards the employers; for, as I have already pointed out, the absence on the part of the federation of any malicious intention to injure the employers in itself affords no sufficient justification. But it was said that the federation had a duty towards the men which justified them in doing what they did. For myself I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so in breaking the

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs, as I have already pointed out. I think, therefore, that the appeal must succeed.

STIRLING L.J. The law applicable to the decision of this case is, in my judgment, as stated by Lord Macnaghten in *Quinn* v. *Leathem*. (1) Referring to *Lumley* v. *Gye* (2) his Lordship said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." If it were necessary to say anything more on the subject of *Lumley* v. *Gye* (2), I should be content to refer to what was said by Lord Herschell in *Allen* v. *Flood* (3), to which I can add nothing.

In my opinion, therefore, only two questions have to be considered: (1.) Did the defendants interfere with the contractual relations between the plaintiffs and their workmen? (2.) Was there in law sufficient justification for the interference?

As to the first question: Bigham J. has expressly found that whatever was done in the way of interference was the act of the federation. I need not refer to specific acts beyond this—that all the men working at the South Wales and Monmouthshire Collieries were directed to observe as holidays two days, October 25 and 26, 1901, contrary to the contracts entered into by the workmen. The uncontradicted evidence of Evan Williams at the trial shews that in consequence of that direction men who otherwise would have worked on those two days did not do so. In these circumstances it seems to me to be made out that the federation wilfully and with notice of the contracts procured some men to break their contracts, and therefore knowingly brought about a violation of legal

(1) [1901] A. C. 495, at p. 510. (2) 2 E. & B. 216.
(3) [1898] A. C. at pp. 121-3.

rights, which is actionable unless there is sufficient justification for what was done. That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognised by the Courts; for the Court of Chancery and the Chancery Division of the High Court of Justice have continually so interfered on behalf of wards of Court, sometimes with a heavy hand; and the principle on which the judges of those Courts have acted is simply that of doing on behalf of the ward that which a right-minded father would do in the true interest of his child. I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of service. I need not say that the present is a very different case from that which I have just put. It would no doubt be desirable if a general rule could be formulated which would determine in what cases such a justification exists; but no such rule has been laid down, and I doubt whether this can be done; so far as I can see it must be left (in the language of Lord Bowen) to the tribunal to analyze the circumstances of each particular case and discover whether a justification exists or not.

In the present case the learned judge finds that the federation and the other defendants "had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and right to give them advice, and to do what might be necessary to secure that the advice should be followed"; and the existence of this duty has been strongly pressed upon us in argument by the learned counsel for the several defendants. It will be observed that the learned judge expressly finds that the defendants were not merely advisers, but also agents "to do what might be necessary to secure that the advice should be followed." In the view which I take of the facts the defendants not only gave advice, but acted, and

C. A. 1903

GLAMORGAN COAL COMPANY v. SOUTH WALES MINERS' FEDERATION.

Stirling L.J.

their action took the form of interfering with the contractual relations between the masters and the men. If in so doing they committed a tort, it would be no answer to say that they acted upon the advice of a third person, as, for example, their own solicitor; and it is difficult to see how they can be in a better position simply because the advice on which they acted emanated from themselves.

In my judgment the liability of the defendants must turn on the answer to be given to the question whether the circumstances of the case were in fact such as to justify the defendants, or any of them, in acting as they did.

The circumstances then were these: Middlemen at Cardiff were attempting to reduce the price of coal, and it was feared that some employers might yield to the pressure of competition and enter into agreements for the sale of coal at prices lower than those existing at the time, with the result that the wages of the miners, which were regulated by a sliding scale, would be reduced.

To counteract this it was considered desirable by the men's advisers that prices should be sustained by diminishing the output of coal, and that this should be effected by the men taking the holidays complained of. It was not contended or suggested that a limitation of the output of coal was an illegitimate object or aim on the part of the men, or that, if it could have been attained without the breach of contracts (as, for example, by the service of proper notices putting an end to those contracts), the men would not have been within their legal rights. The difficulty which presented itself was this—that one of the terms of the arrangement under which the sliding scale of wages existed was that notices of the determination of contracts of employment should only be given on the first day of a calendar month to terminate on the last day, and this prevented notices of determination being effective at the desired moment. The critical period was known to occur in October or November. The men persuaded themselves that it was the masters' interest as well as their own that they should have power to take holidays at this period; but this was a point on which the masters were

entitled to have their own opinion; and from what occurred in November, 1900, it was known to the men that the masters' view did not agree with that of the men. If the men had faith in the soundness of their opinion, their course was to negotiate through the defendants for a modification of the sliding scale arrangement: what they actually thought fit to do was that while insisting on the benefit of the sliding scale they treated themselves as emancipated from the observance of one of the terms on which that scale had been agreed to, although the masters objected, and although the course taken by the men might result in serious damage to the masters, or some of them. This is, I think, a difficult position to maintain. The justification set up seems to me to amount to no more than this—that the course which they took, although it might be to the detriment of the masters, was for the pecuniary interest of the men; and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said, interfered to bring about the violation of legal rights. In my judgment they fail to justify those acts, and the appeal ought to be allowed.

THE COURT declined to grant an immediate injunction, but reserved liberty to the plaintiffs to apply for an injunction in case it should be necessary to do so.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Riddell & Co., for Walter Morgan, Bruce & Nicholas, Pontypridd.*

W. L. C.

C. A.

1903

July 29, 30; *Aug.* 11.

[IN THE COURT OF APPEAL.]

CORPORATION OF SHEFFIELD *v.* BARCLAY.

Company—Indemnity—Forged Transfer of Stock—Innocent Presentment for Registration—Implied Contract to indemnify.

The defendants presented for registration a transfer to themselves of stock issued by the plaintiff corporation with a letter requesting the corporation to register the transfer and to send them a new certificate. One of the signatures to the transfer was in fact forged, though the defendants believed it to be genuine. The corporation, believing the transfer to be genuine, registered it, and issued a certificate to the defendants as holders of the stock. It was admitted that there was no negligence on the part of the corporation, and that the defendants acted bonâ fide. Soon afterwards the stock was sold, and was transferred to the purchaser, who was duly registered as the holder.

Some years afterwards the forgery was discovered, and the corporation were compelled to make good the loss to the original holder by purchasing other stock for him. The duties of the corporation as to the transfer of stock were regulated by a private Act the provisions of which were in substance the same as those of the Companies Act, 1862, with regard to the transfer of shares in companies formed under that Act:—

Held, that as the transfer to the defendants was registered and the certificate issued to them by the corporation in pursuance of their statutory duty, and not voluntarily by reason of a request by the defendants, there was no implied contract by the defendants to indemnify the corporation against the loss which they had sustained.

Decision of Lord Alverstone C.J., [1903] 1 K. B. 1, reversed.

APPEAL from the decision of Lord Alverstone C.J. (1)

The facts were thus stated by the learned judge in his written judgment:—The action was brought by the corporation of Sheffield against Messrs. Barclay & Co., the well-known bankers, to recover the sum of 11,487*l.* 17*s.* 5*d.*, being the amount of principal and interest of certain corporation stock which belonged to certain trustees named Timbrell and Honnywill, and was transferred to a nominee of the defendants under a transfer purporting to be executed by Honnywill, but which, for the purpose of this action, must be taken to have been

(1) [1903] 1 K. B. 1.

a forgery. The facts may be very briefly stated. Prior to April 13, 1893, 8500*l.* Sheffield Corporation Redeemable Stock was transferred to the names of A. A. Timbrell and A. O. Honnywill, who were, I understand, trustees of a certain estate. The certificate of the stock in their names bearing date April 13, 1893, was produced before me. The stock had stood in the name of Sutcliffe from 1886, but had been transferred, as I was informed, on change of trustees to Timbrell and Honnywill on March 29, 1893, and on April 13, 1893, a certificate was issued in their names. Upon April 11, 1893, a transfer of 8200*l.* of this stock to E. E. Barclay, a representative of the defendants, purporting to be executed by Timbrell and Honnywill, was handed to the defendants Barclay & Co. For the purpose of this case it must be taken that the signature of Honnywill to the transfer of April 11 was a forgery. On April 15, 1893, the defendants Messrs. Barclay & Co. sent the transfer of the 11th to the corporation, inclosed in a letter in the following terms: "54, Lombard Street, London, E.C., April 15, 1893. Messrs. Barclay, Bevan, Ransom & Co. present their compliments to the registrar of the Sheffield Corporation, and beg to send inclosed the transfer of 8200*l.* 3½ per cent. 1883 stock, and will be obliged by his registering the same in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also inclose the amount of the registration fee. The Registrar, Sheffield." This was followed by a letter of the 17th from Mr. Sarkas, the registrar, acknowledging the receipt, but pointing out that the registration fee had not been sent; and on April 18 Messrs. Barclay & Co. sent the registration fee. On April 28, 1893, E. E. Barclay, the transferee named in the forged transfer of April 11, executed a transfer of 8000*l.* of the stock to Messrs. Young & Macdonald, and, upon May 12, of the balance, 200*l.*, to Mary Florence Cockayne. Upon June 1 the plaintiffs issued certificates to Young & Macdonald for the 8000*l.* and to Mary Cockayne for the 200*l.* In the year 1901 an action was brought by Honnywill against the corporation, claiming the rectification of the register by inserting his name as the holder of the 8200*l.* stock transferred to E. E. Barclay under the forged transfer

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

and the interest and dividends paid thereon. In that action the jury found that the transfer was a forgery and had not been executed by Honnywill or with his authority, and for the purpose of this action it was agreed that the defendants were bound by that finding.

The duties of the corporation with regard to the registration and transfer of stock were regulated by ss. 27–32 of the Sheffield Corporation Act, 1883 (46 & 47 Vict. c. lvii.), the provisions of which were in substance the same as those contained in the Companies Act, 1862, with regard to the transfer of the shares of a company under that Act.

The learned judge found as a fact that there was no negligence either on the part of the defendants or their agents, or on the part of the registrar or of any official of the corporation. And the learned judge came to the conclusion that, as between the two innocent persons, the plaintiffs and the defendants, the loss should be borne by the defendants, who had innocently caused the plaintiffs to act upon an instrument which turned out to be invalid. And he gave judgment for the plaintiffs for the amount claimed, and made a declaration that the plaintiffs were entitled to be indemnified by the defendants in respect of the liabilities arising from the transactions.

The defendants appealed.

Haldane, K.C., and *F. R. Radcliffe*, for the defendants. The plaintiffs are not entitled to an indemnity. There can be no claim for an indemnity between joint tortfeasors, but where in an honest transaction such as this there exists the relationship of principal and agent, or master and servant, a mere request by the former to the latter is enough to give rise to the implication of a contract to indemnify. Where there is no such relationship it is necessary to find an actual and imperative direction of such a nature that the Court can ascertain that the person thus directed acted under the order and on no other ground: *Collins* v. *Evans* (1); *Toplis* v. *Grane*. (2) This action is not maintainable, for there has been no fraudulent representation, no direction by the defendants to the plaintiffs,

(1) (1844) 5 Q. B. 820. (2) (1839) 5 Bing. N. C. 636; 50 R. R. 814.

and no relationship of principal and agent or master and servant: *Childers* v. *Wooler* (1); *Dugdale* v. *Lovering* (2); *Smith* v. *Keal.* (3) There has been no negligence on the part of the defendants; the plaintiffs registered the transfer in pursuance of the obligation imposed on them by ss. 29, 30, and 31 of the Sheffield Corporation Act, 1883, and s. 25 of the Companies Act, 1862, to keep the register correct, and not in consequence of the defendants' request. It was their duty to make inquiries and verify the signatures. The defendants rely on the judgment of Lindley J. in *Simm* v. *Anglo-American Telegraph Co.* (4), which has never been overruled on this point, and illustrates the distinction between acts done under an obligation and acts done in compliance with a request. That decision is in accordance with *In re Bahia and San Francisco Ry. Co.* (5), and was affirmed by *Balkis Consolidated Co.* v. *Tomkinson* (6) and *Dixon* v. *Kennaway & Co.* (7) These cases shew that if in the ordinary course of business a man brings a transfer to a company and gets a certificate from them and they suffer damage, he is not in the position of a master towards the company, and no indemnity can be implied.

[STIRLING L.J. referred to *Cottam* v. *Eastern Counties Ry. Co.* (8) and *Johnston* v. *Renton* (9) as to the form in which the action ought to be brought.]

The question has arisen in cases on third-party procedure, e.g., *Carshore* v. *North Eastern Ry. Co.* (10), where, however, the Court only went so far as to say that notice of claim for indemnity might be served; and *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (11), where the rule is stated.

Danckwerts, K.C., *Bankes, K.C.*, and *Waddy*, for the plaintiffs. The Sheffield Corporation Act, 1883, imposes on the corporation the duty of keeping a register similar to the duty

(1) (1859) 2 E. & E. 287.
(2) (1875) L. R. 10 C. P. 196.
(3) (1882) 9 Q. B. D. 340.
(4) (1879) 5 Q. B. D. 188, 194, 195.
(5) (1868) L. R. 3 Q. B. 584.
(6) [1893] A. C. 396.
(7) [1900] 1 Ch. 833.
(8) (1860) 1 J. & H. 243.
(9) (1870) L. R. 9 Eq. 181.
(10) (1885) 29 Ch. D. 344.
(11) (1886) 34 Ch. D. 261, 272.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

of levying execution imposed by law on a sheriff. The corporation must accept the statement of the transferee and register the transfer, unless they can shew that it is fraudulent. Whether the corporation ought to make inquiries or not is immaterial, but no such duty is cast upon them by the Act. It is no answer to an action, brought to rescind a contract on the ground of misrepresentation, to say that the plaintiff might have known the truth by proper inquiry: *Venezuela Ry. Co.* v. *Kisch* (1); *Redgrave* v. *Hurd.* (2) The Companies Act, 1862, does not affect this case, except in so far as decisions under it are applicable. It is admitted that the corporation were obliged to register the transfer; but that was because the defendants represented that it was signed by A. O. Honnywill. Therefore *Starkey* v. *Bank of England* (3) applies, and the defendants must indemnify the corporation. An express direction to the corporation was not necessary to produce this result: *Toplis* v. *Grane* (4); *Childers* v. *Wooler.* (5) No harm could be done to the corporation unless the transferee sold the shares. The transfer was for the benefit of the transferee, and so also was the registration.

[VAUGHAN WILLIAMS L.J. Is not the transfer delivered to the corporation in order that they may ascertain whether it is duly executed?]

The transferee cannot be heard to say that the corporation ought not to have acted upon his representation. A sheriff is entitled to accept the execution creditor's statement as to the ownership of goods which he is to seize. A person who sends in a transfer of stock for registration must be taken to assert that he is the purchaser of the stock. The corporation may not be bound to accept the transfer without inquiry, but, if they do accept it, the transferee cannot complain. The corporation acted upon the express request of the defendants: *Dugdale* v. *Lovering* (6); *Betts* v. *Gibbins.* (7) No doubt there is a distinction between cases in which the person who

(1) (1867) L. R. 2 H. L. 99.
(2) (1881) 20 Ch. D. 1.
(3) [1903] A. C. 114.
(4) 5 Bing. N. C. 636; 50 R. R. 814.
(5) 2 E. & E. 287.
(6) L. R. 10 C. P. 196.
(7) (1834) 2 A. & E. 57; 41 R. R. 381.

is called on to do an act is under a duty or obligation to do it, and cases in which there is no such duty. But in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1) Cotton L.J., referring to *Carshore* v. *North Eastern Ry. Co.* (2), said: "In that case the transferee requested the company to register the transfer, and there would be an implied contract to indemnify them for acting on that request." *Simm* v. *Anglo-American Telegraph Co.* (3) was a case upon estoppel. Estoppel does not confer a title; it is only a rule of evidence: *Hart* v. *Frontino, &c., Gold Mining Co.* (4); *Low* v. *Bouverie* (5), per Bowen L.J.; *Balkis Consolidated Co.* v. *Tomkinson.* (6)

[VAUGHAN WILLIAMS L.J. We have not in the present case to decide whether there is an estoppel; it is only relevant as negativing the inference of an indemnity.]

Dixon v. *Kennaway & Co.* (7) shews the effect of a share certificate. If it is based on a forged transfer it does not estop the company as against the person to whom it is issued. The following cases — *Richardson* v. *Williamson* (8); *Firbank's Executors* v. *Humphreys* (9); *Oliver* v. *Bank of England* (10); *Starkey* v. *Bank of England* (11)—apply, and shew that the defendants in effect warranted the genuineness of the transfer which they tendered for registration, and are liable to indemnify the corporation. The two American decisions—*Boston and Albany Railroad Co.* v. *Richardson* (12) and *Brown* v. *Howard Fire Insurance Co.* (13)—support the plaintiffs' argument. The view expressed by Lindley J. in *Simm* v. *Anglo-American Telegraph Co.* (14) was not the basis of the decision. The defendants were bound to make inquiry as to the genuineness of the transfer. The corporation were entitled, but not bound, to inquire. The defendants represented the transfer to be genuine, and asked the corporation to act upon it. The

(1) 34 Ch. D. 261, at p. 269.
(2) 29 Ch. D. 344.
(3) 5 Q. B. D. 188.
(4) (1870) L. R. 5 Ex. 111.
(5) [1891] 3 Ch. 82, 105.
(6) [1893] A. C. 396.
(7) [1900] 1 Ch. 833.
(8) (1871) L. R. 6 Q. B. 276.
(9) (1886) 18 Q. B. D. 54.
(10) [1902] 1 Ch. 610.
(11) [1903] A. C. 114.
(12) (1883) 135 Mass. 473.
(13) (1875) 42 Maryland Rep. 384.
(14) 5 Q. B. D. at pp. 194, 195.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

corporation acted upon it, and are therefore entitled to an indemnity from the defendants against the loss which they have suffered. The right inference is that the corporation acted on the request of the defendants, and this gives rise to an implied contract by them to indemnify the corporation.

F. R. Radcliffe, in reply. The corporation did in fact compare the alleged signature of Honnywill with a genuine signature of his which they had; they did not act on the request of the defendants. In *Oliver* v. *Bank of England* (1) the action was founded on a warranty of the genuineness of a power of attorney and on *Collen* v. *Wright*. (2) In the case of a warranty the Statute of Limitations runs from the date of the making of the representation: *Gibbs* v. *Guild*. (3)

[*Danckwerts, K.C.* This action is not founded on a warranty.]

The observations of Lindley J. in *Simm* v. *Anglo-American Telegraph Co.* (4) exactly apply, and they were not disapproved by the Court of Appeal in that case. A person who sends in a transfer for registration has no intention of warranting that it is genuine. A contract to indemnify cannot be implied when without any warranty a document is put forward innocently in the belief that it is genuine: *Low* v. *Bouverie*. (5) The American cases cited are not law in this country. *Derry* v. *Peek* (6) has not been accepted by the American Courts.

[VAUGHAN WILLIAMS L.J. referred to *Nickalls* v. *Merry*. (7)]

The corporation, as official custodians of the register of their stock, had imposed on them the duty of keeping the register correctly, and they were put upon inquiry. Unless the transferee has requested the corporation to go beyond their statutory duty and to do some special act for him, and they have acceded to that request, no contract of indemnity by him can be implied. The defendants altered their position on the faith of the certificate which the corporation issued to them, and rendered themselves liable to third persons: Pollock on Torts, 3rd ed. p. 282.

Cur. adv. vult.

(1) [1902] 1 Ch. 610.
(2) (1857) 8 E. & B. 647.
(3) (1881) 8 Q. B. D. 296.
(4) 5 Q. B. D. at p. 194.
(5) [1891] 3 Ch. 82.
(6) (1889) 14 App. Cas. 337.
(7) (1875) L. R. 7 H. L. 530.

Aug. 11. The following judgments were read :—

VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of Lord Alverstone C.J. in an action tried by him without a jury. The facts will be found sufficiently set forth in the judgment of the Lord Chief Justice. [The learned judge gave a summary of the facts, and continued :—]

The Sheffield Corporation, in the present action, claim that the defendants are liable to repay them the moneys so paid as aforesaid, and to indemnify the plaintiff corporation in respect of the said liabilities. The plaintiffs shape their case in this way. They say that they have done a lawful act at the request of the defendants, which lawful act had caused the plaintiffs damage, and that, therefore, the defendants were liable for the damage so caused to the plaintiffs. They also say that the question whether a contract of indemnity ought to be implied is in each case a question of fact; and that the implication ought to be made in this case by reason of the defendants having sent in to the plaintiffs the forged transfer at the time when they requested, or, to use the word of the special Act, demanded registration and a certificate. Before dealing more particularly with the terms of the Sheffield Act and the authorities bearing on the circumstances justifying an implication of a contract of indemnity, I wish to say at once that I regard what the defendants did and the act of the corporation thereupon as being aptly described by the words of Bramwell B. in *Hart* v. *Frontino, &c., Gold Mining Co.* (1): "I made you a tender of myself as a shareholder, and you accepted me, and I have acted upon that acceptance." And I do not think that the defendants in sending in a transfer to the corporation gave any warranty to the corporation, or made any material representation to the company, that the transferor was the registered holder of the stock: see the judgment of Lord Field in *Balkis Consolidated Co.* v. *Tomkinson* (2), where he says that a purchaser sending in a transfer to the corporation makes no representation which might estop him as against the corporation. See also an observation of

(1) L. R. 5 Ex. at p. 115. (2) [1893] A. C. at p. 413.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

Vaughan Williams L.J.

Brett L.J. to the same effect in *Simm* v. *Anglo-American Telegraph Co.* (1)

I will now deal with the authorities. It seems to me perfectly clear that a distinction must be drawn between cases where a request is made to some one who has no duty in the matter independently of the request, and cases where the request is made to one who has a duty in the matter independently of the request. In the former case, where that which is requested to be done does not appear to be illegal, and an act is done in accordance with the request, the implication of a contract of indemnity by the person making the request will generally be made. In the latter case something more than a mere request will be required to raise the contract of indemnity. This distinction is apparent by a comparison of the cases of indemnity claimed by sheriffs with cases where an indemnity is claimed by those who have no duty in the matter. The fact is that in the former class of cases the request or instruction is the sole cause of the act. In the latter the performance of the duty is, or may be, the dominant cause. *Collins* v. *Evans* (2) is a case in the Exchequer Chamber, in which the defendants, having reason to believe and actually believing a fact to be true and representing it as such to the sheriffs, who had a duty in the matter, were held not to be liable to an action, although it turned out in the event that they were mistaken; and Tindal C.J. distinguished that case from *Humphrys* v. *Pratt* (3), on the ground that in that case the plaintiff pointed out the goods and required the sheriff to take them. *Childers* v. *Wooler* (4) is a case on the same lines, in which the defendant Wooler, as attorney for the plaintiff in that suit, caused a writ of fi. fa. to be issued upon the judgment, and the usual indorsement of the amount to be levied was followed continuously by these words: "The defendant is a" (here there was a blank), "and resides at Redcar, in your bailiwick"; and the Court of Exchequer Chamber held that the indorsement was nothing more than a mere statement by the attorney for the purpose

(1) 5 Q. B. D. 188, at p. 210.
(2) 5 Q. B. 820.
(3) (1831) 5 Bli. (N.S.) 154; 35 R. R. 41.
(4) 2 E. & E. 287.

of affording information to the sheriff, leaving the sheriff to his own discretion as to how he would act. On the other line of cases one finds as examples *Toplis* v. *Grane* (1), in which the defendants authorized the plaintiffs as brokers to distrain, and the plaintiffs, after asking for an indemnity, proceeded to distrain and took some privileged goods in bona fide compliance with the defendants' directions, without, however, having obtained an indemnity, and the defendants were held liable. And, again, in *Betts* v. *Gibbins* (2) goods were deposited by the defendant with the plaintiffs for N., who took two casks away, and the defendant ordered the plaintiffs not to deliver the residue of the goods, which order the plaintiffs obeyed. The plaintiffs being sued and having paid a sum of money and costs to compromise the action, it was held in an action by the plaintiffs against the defendant that a promise to indemnify to the full amount claimed might be implied from the facts. These were cases in which there was no relation of principal and agent, and the mere request or instruction by the defendant to the plaintiff to withhold the goods from N., obeyed by the plaintiff, was held to be sufficient evidence to raise a contract of indemnity. Where the relation of principal and agent exists it is a fortiori that a contract of indemnity may arise on the facts. These cases illustrate the distinction which I have drawn.

I will now deal with the special provisions of the Sheffield Act, although I do not think that they differ materially from the provisions to be found in the Companies Act, 1862. The most material provisions seem to me to be s. 25, sub-s. 1, which requires the corporation to keep books in which shall be entered the names and addresses of the holders from time to time of corporation stock; and, sub-s. 2, that the corporation stock register shall be primâ facie evidence of the title of the persons entered therein as holders of stock. Sect. 26, sub-s. 1, which provides that, on demand of a holder of corporation stock, the corporation may if they think fit give him a certificate of the proprietorship thereof; sub-s. 2, that a stock certificate shall be primâ facie evidence of the title of the

(1) 5 Bing. N. C. 636; 50 R. R. 814. (2) 2 A. & E. 57; 41 R. R. 381.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

Vaughan Williams L.J.

person therein named. Sect. 29, sub-s. 1: That where stock is transferable by deed (which is this case)—sub-s. 4—the deed of transfer when duly executed shall be delivered to and kept by the corporation or the registrar, and the corporation or the registrar shall enter a memorial thereof in the register of transfers; sub-s. 5, the corporation or the registrar shall on demand and on delivery up of the old stock certificate, or on proof satisfactory to the corporation of its absence, deliver a new stock certificate to the purchaser; sub-s. 6, until the deed of transfer has been so delivered the corporation shall not be affected thereby, and the purchaser of stock shall not be entitled to receive any dividend thereon. Sect. 30, sub-s. 1: The corporation or the registrar, before allowing any transfer of stock, may, if the circumstances of the case appear to make it expedient, require evidence of the title of any person claiming a right to make the transfer. It seems to me that in this case those who sent the old certificate to the corporation—that is to say, those who claim to be vendors—claim a right to make the transfer, and in my judgment all that Barclays did was to tender the transfer for acceptance, and the corporation accepted the transfer. The case, as pointed out by Bramwell B. in *Hart* v. *Frontino, &c., Gold Mining Co.* (1), is analogous to that of a bonâ fide holder of a bill of exchange presenting it for payment to a banker—if the banker pays it he cannot afterwards recover the money from the holder on the ground that the name of the drawer was forged. Lindley J. took the same view in *Simm* v. *Anglo-American Telegraph Co.* (2) In my judgment the provisions of the special Act bring this case within the observations of Blackburn J. in *In re Bahia and San Francisco Ry. Co.* (3), approved by Lord Herschell in *Balkis Consolidated Co.* v. *Tomkinson.* (4) Those observations of Blackburn J. run thus: That when joint stock companies were established the great object was that the shares should be capable of being easily transferred; that the Legislature had accordingly provided for the keeping of a register of the members, in order to keep which the

(1) L. R. 5 Ex. 111, at p. 115.
(2) 5 Q. B. D. 188, at p. 195.
(3) L. R. 3 Q. B. 584, at p. 595.
(4) [1893] A. C. 403.

company must alter the register whenever there was a transfer of its shares; and the learned judge drew attention to s. 31 of the Companies Act, 1862, which provides that a company may give certificates, and that these shall be primâ facie evidence of the title of the person named to the shares specified, and pointed out that by granting the certificate the company make a statement that they have transferred the shares specified to the person named in it and that he is the holder of the shares; that if the company have been deceived and the statement is not true, they may not be guilty of negligence, but they and no one else had power to inquire into the matter. The learned judge expressed the opinion that it was the intention of the Legislature that these certificates should be documents on which buyers might safely act, and continued thus (1): "It is quite clear that a statement of a fact was made by the company, on which the company at the very least knew that persons wanting to purchase shares might act. And the claimants having bonâ fide acted upon that statement, and suffered damage, can they recover from the company? I think they can on the principle enunciated in *Freeman* v. *Cooke*." (2) And Lord Herschell points out (3) that it makes no difference whether it is the purchasers who are seeking to render the company liable by way of estoppel or the vendor of the shares who himself received the certificate from the company, because it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the faith of it enter into a contract to sell the shares. It seems to me to be the fact in the present case.

I have only now to deal with the cases directly bearing on the position and rights relatively of the person who tenders a transfer for acceptance and the company who accept it. It was not really contested in argument before us that the corporation had some duties towards the person tendering the transfer. It was admitted that it was their duty to look at their register; and it was admitted that, in some cases at

(1) L. R. 3 Q. B. at p. 596. (2) (1848) 2 Ex. 654.
(3) [1893] A. C. at p. 405.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

Vaughan Williams L.J.

all events, the character of the duty was such that the issue of the certificate might raise an estoppel against the corporation if they neglected that duty. Indeed, the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson* (1) affirmed the judgment in favour of the plaintiff on the basis of the estoppel arising on the issue of the certificate; and it seems to me that in the main the opinions of the Law Lords were rather in favour of than contrary to the opinion of Bramwell B. in *Hart* v. *Frontino, &c., Gold Mining Co.* (2) and Lindley J. in *Simm* v. *Anglo-American Telegraph Co.* (3) It is true that Lord Macnaghten in his judgment says (4): "Whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made, to which he has in a sense and to a certain extent contributed, is, I think, a matter not unworthy of consideration. The point, however, was not argued; the evidence bearing upon it was not sifted, and the attention of the learned counsel for the respondents was not called to it. It would not, therefore, be right for me to say more than that in my opinion there is nothing to prejudice the question, if it should ever be raised, even under circumstances similar to those which have occurred in the present case. With this reservation, I concur in the motion that has been proposed." But this doubt as to the estoppel seems to me rather to negative than to affirm that in such a case there would be evidence upon which to raise an implied contract of indemnity. Then, again (4), Lord Field, after affirming in general terms the view of Lord Herschell, and agreeing in the view that a transferor who has entered into a contract to deliver valid shares upon the faith of a certificate of his ownership issued to him by the company is in the same position as a purchaser, goes on to say: "I can, however, well understand that there may be cases in which, the untruth of the statement not depending upon any fact within the knowledge of the company as to which they have means of knowledge, which they reasonably ought to have recourse to, and the person setting up the estoppel having equal means of

(1) [1893] A. C. 396.
(2) L. R. 5 Ex. 111.
(3) 5 Q. B. D. 188.
(4) [1893] A. C. at p. 411.

knowledge, and having applied for and obtained the certificate upon an alleged transfer—I say there may be such cases in which no such estoppel may exist." And he goes on to say that such a state of things existed in *Simm* v. *Anglo-American Telegraph Co.* (1), and to agree with the Court of Appeal in that case that there was no duty upon the company to inquire of a registered holder whether the signature was genuine, although it was the practice to do so. This passage raises a doubt as to estoppel in other cases; but the next passage seems to me distinctly to negative the raising of any contract of indemnity against the person presenting the transfer, in case it turns out in fact not to have been executed by the person purporting to be the transferor, for he says (2): "In sending in a transfer to a company for registration it does not appear to me that the applicants give any warranty, or even make a material representation to the company, that the transferor is the registered holder of the shares." But in the same judgment (2) he says that it is at least the duty of a company, before affixing the seal of the company to a representation which they know that the applicant requires as evidence of title upon which he may go into the market and make contracts of sale, according to the regulations of the Stock Exchange, and involving the duty of making a complete delivery of genuine shares, to ascertain by reference to their own register whether the proposed transferor appears to be the holder of the shares which he purports to transfer—is the registered holder of the shares. How can it be said that, in a case in which the corporation had a statutory duty to accept or reject the transfer, a contract of indemnity is raised against the person who, in presenting the transfer, gave no warranty and made no material representation? So to hold, in my judgment, would be inconsistent with business and would materially impede that traffic in shares and stock which is essential to the very existence of joint stock companies and to the floating of loans to municipal corporations. In my judgment, the judgment of the Lord Chief Justice was wrong and ought to be reversed.

(1) 5 Q. B. D. 188.

(2) [1893] A. C. at p. 413.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

ROMER L.J. I have come to the same conclusion. After the judgment of the Lord Justice I will only say a few words. In the first place, it is important to remember that the sole question before us is whether a contract of indemnity can be implied. I say this, because it may well be that the transaction between the parties gave rise to some rights on the part of the corporation against the defendants. For instance, if the corporation had been fortunate enough to discover the forgery in good time, and before the defendants had in any substantial way altered their position on the faith of the certificate issued to them, it would have been entitled to bring an action against the defendants to recover the certificate, and to establish the right of the corporation to remove the name of the defendant E. E. Barclay from the register of stockholders in respect of the stock in question. But can a contract of indemnity be implied? Now that kind of contract is a very onerous one on the part of the person who has to indemnify, and is one not lightly to be implied. And in the circumstances of this case it appears to me that it ought not to be implied. This is not the case where a person, having no independent duty or obligation to do a particular act, does that act at the request and for the purposes of another. In such a case, if the act is one not known by him at the time to be illegal, but is one that turns out to be wrongful, the person doing the act may make the person requesting it indemnify him under an implied contract. But in the present case it was in the interest of the corporation itself to keep the register of stockholders and issue certificates, and the corporation was bound to keep the register correctly. The defendants were obliged to send in the transfer to E. E. Barclay, and to get the transferee registered by the corporation, assuming (as the facts were) that they believed the transfer to be genuine, and desired, accordingly, to be duly recognised as holders of the stock. The corporation did not act voluntarily on the request for registration made by the defendants. It acted because of the duty cast upon it, and (partly, at any rate) for its own purposes. When it received the transfer it had a duty or obligation cast upon it, as between itself and the transferor, to see that the transfer was really the

act of the transferor. Accordingly the corporation took such steps as seemed to it sufficient to satisfy itself that the transfer was genuine. It compared the signature of the transferor in its possession with the signature to the transfer, and sent notice to the transferor that it was going to act on the transfer if no objection was taken by him. In fact, the corporation judged and acted for itself in dealing with the transfer, and did not act merely on the request of the defendants. Nor is this a case where, as between these parties in favour of the corporation, the authenticity of the signature of the transferor is to be taken to be a matter exclusively in the knowledge of the defendants. As a matter of business it cannot be that the corporation was entitled to assume that the transferee of stock in ordinary course had personally the means of seeing, or ought by self or agent to see, the actual execution of the transfer by the transferor. The purchase and transfer of stocks and shares on the Stock Exchange and elsewhere could never practically be carried out if the purchaser were in each case, having regard to his possible future dealings, bound to see by himself or his agent personally to the execution of the transfer by the transferor. And I think the corporation must be taken to have known this. The transferee is not, in reference to the transfer, in the same position as the corporation is with regard to the position of the transferor as registered owner of the stock; for the register of stockholders is in the possession of the corporation, and the corporation is bound to keep it correctly. This being so, it appears to me that all that could be assumed by the corporation as against the transferee sending in the transfer for registration was that the transferee had taken reasonable care in the matter, and had reasonable ground for believing and did believe that the transfer, which, on the face of it, purported to be executed by the transferor, was, in fact, so executed. No representation could, in my opinion, be implied, under the circumstances, against the transferee beyond what the corporation was entitled to assume against him as above stated. I think, therefore, that no warranty of the execution of the transfer by the transferor ought to be implied as between the transferee and the corporation. But I may

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

Romer L.J.

point out that, even if some representation beyond what I have above stated could, under the circumstances, be implied as against the defendants, or even if a warranty could be implied as against them, it would not of necessity follow that a contract of indemnity should be implied. A warranty and a contract of indemnity are distinct: one important difference being the period from which the Statute of Limitations would run. And, in the present case, whatever other implications might be made against the defendants, I think it would not be right to imply a contract of indemnity.

STIRLING L.J. The facts which gave rise to this action may be stated very shortly. The plaintiffs are the corporation of Sheffield, and have, under the authority of a private Act of Parliament, issued an irredeemable stock, bearing interest at 3½ per cent. The Act imposes on the plaintiffs duties with respect to the registration of transfers of such stock and the issue of certificates to stockholders. The defendant E. E. Barclay is a member of a banking company (his co-defendants), who made an advance to customers on the security of what purported to be a transfer to him of 8200*l.* of the corporation stock. This transfer he sent to the plaintiffs with a request that it might be registered and new certificates issued. With this request the plaintiffs complied. The defendants' customers then sold the stock, and the defendant E. E. Barclay concurred in a transfer to the purchasers. Some years afterwards it was discovered that the transfer to the defendants was a forgery, and the plaintiffs were compelled to make good the loss to the true owners of the stock. This action is brought by the plaintiffs to obtain indemnity from the defendants against the loss thus sustained by the plaintiffs. It is admitted, on the one hand, that the plaintiffs acted without any negligence; and, on the other, that the defendants acted in perfect good faith. The provisions of the plaintiffs' Act as to keeping a register of transfers and the issue of certificates do not materially differ from those contained in the Companies Act, 1862; and with reference to them it was pointed out by the Court in *In re*

Bahia and San Francisco Ry. Co. (1) that the effect was to make the shares of the company more easily dealt with, and, consequently, of greater value. This view was adopted and acted on by the House of Lords in *Balkis Consolidated Co.* v. *Tomkinson.* (2) The provisions of the plaintiffs' Act, although they impose a burden on the plaintiffs, are, nevertheless, to their advantage; for in the absence of them it might be presumed that the stock could not have been issued with equal advantage to the plaintiffs. The Act does not expressly confer any right of indemnity on the plaintiffs; and if any such right exists it must arise by implication of law. The main contention before us is that there is on the part of the defendants an obligation so arising. Now the mere performance of a duty imposed by law on any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. If, however, the person who owes the duty departs at the request of him to whom it is due from the strict legal course of performance of that duty or puts himself in a different position from that created by law, then a consideration may arise for a promise express or implied. This is illustrated by the cases relating to the indemnity of sheriffs, which were much relied on in the argument on behalf of the plaintiffs. It was decided in *Bridge* v. *Cage* (3) that a promise to pay money to a sheriff in consideration of his executing a writ of elegit, which the sheriff by the common law was bound to execute without remuneration, could not be enforced by action. In *Arundel* v. *Gardiner* (4) it was held that a promise made by an execution creditor to a sheriff to save him harmless in consideration that he would execute a writ of fi. fa. by seizing particular goods was enforceable. In *Humphrys* v. *Pratt* (5) a sheriff who had at the request of the execution creditor seized particular goods was held by the House of Lords to be entitled to an indemnity, although not expressly agreed to by the execution creditor. There is, unfortunately, no report of

(1) L. R. 3 Q. B. 584.
(2) [1893] A. C. 396.
(3) (1605) Cro. Jac. 103.
(4) (1621) Cro. Jac. 652.
(5) 5 Bli. (N.S.) 154; 35 R. R. 41.

C. A. 1903

SHEFFIELD CORPORATION v. BARCLAY.

Stirling L.J.

what was said by the noble and learned Lords who advised the House; but in *Collins* v. *Evans* (1) the ratio decidendi is explained by Tindal C.J. in delivering the judgment of the Exchequer Chamber. If, then, the goods are simply pointed out to the sheriff and he is left to follow his discretion—that is, to take the legal course—he is not entitled to indemnity; but if he is required to seize them he is. The sheriff in the latter case gives up his right to make inquiry as to the ownership of the goods and take steps for his own protection, in case there should be forthcoming a claim to them other than the claim of the execution creditor, and puts himself in the position of a mandatory or agent of the execution creditor for the purpose of taking the goods; and is held to be entitled to the benefit of an implied agreement for his indemnity. In the present case the plaintiffs were under a statutory obligation to register transfers and issue certificates; the defendant called on them to perform their duty under the statute with regard to the transfer which he forwarded to them; and, as it seems to me, he did nothing more. The plaintiffs were left to perform their legal obligations; they gave up no right, and assumed no different position to the defendant than that created by the statute; and, in my judgment, are not entitled to the indemnity sought in the action. Inasmuch as the defendant E. E. Barclay was admittedly innocent of anything in the shape of fraud, the plaintiffs had not, and did not in fact claim to have, any cause of action based on misrepresentation. It was suggested, though somewhat faintly, that the defendant warranted to the plaintiffs the genuineness of the transfer. In my judgment the defendant did not give any such warranty. I think that the true nature of the transaction between the plaintiffs and the defendants is as stated by Lindley J. in his judgment in *Anglo-American Telegraph Co.* v. *Spurling* (2); but, further, it seems to me that, even if the warranty was given, the Statute of Limitations, which is pleaded, is an answer to any claim founded on it; for the warranty was broken and the cause of action (if any) accrued more than six years before the commencement of this action. The learned

(1) 5 Q. B. 830. (2) 5 Q. B. D. at p. 194.

Lord Chief Justice based his decision on that of the Court of Appeal in *Simm* v. *Anglo-American Telegraph Co.* (1), which he held to be an authority for the proposition that, as between two innocent parties, one of whom had innocently and without negligence handed in a forged transfer upon which a joint stock company (under the Companies Act, 1862) was asked to act, the loss was to fall upon the person who handed in the transfer. I desire to point out that the position of the plaintiffs in that case does not in all respects resemble that of the defendant E. E. Barclay in the present case. The bank for whom the plaintiffs in *Simm* v. *Anglo-American Telegraph Co.* (1) were trustees had, before action brought, received payment of their advances in full from their customers, who had not dealt with the stock or acted on the certificate issued by the company; whereas in the present case the defendants and their customers have dealt with the stock on the faith (as I understand) of the certificate issued by the corporation of Sheffield. The materiality of this circumstance is shewn by *Balkis Consolidated Co.* v. *Tomkinson* (2), to which, unfortunately, the attention of the Lord Chief Justice does not appear to have been called. The House of Lords there held that a person who has procured the registration of an invalid transfer of shares in a joint stock company, and to whom certificates have been issued, is entitled, if he has sold the shares on the faith of those certificates, to recover damages from the company upon a refusal to register his purchasers as owners of the stock. It is quite true that there the invalidity was not the result of forgery, and that this was one of the grounds by which *Simm* v. *Anglo-American Telegraph Co.* (1) was distinguished; but, at the same time, it seems to have been the opinion of Brett L.J. (3) and of Cotton L.J. (4) that the plaintiffs in that action would, notwithstanding the forgery, have had a good title as against the company so long as the advances made by the bank remained unpaid. However this may be, all the learned judges of the Court of Appeal expressly leave open the question raised by the action *Anglo-American*

(1) 5 Q. B. D. 188.
(2) [1893] A. C. 396.
(3) 5 Q. B. D. at p. 207.
(4) 5 Q. B. D. at p. 215.

C. A 1903

SHEFFIELD CORPORATION v. BARCLAY.

Telegraph Co. v. *Spurling* (1), which Lindley J. had decided adversely to the company. With that decision I agree; and, in my judgment, this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Maples, Teesdale & Co.; R. F. & C. L. Smith, for H. Sayer, Sheffield.*

W. L. C.

C. A. 1903 *June* 18, 25, 29; *Aug.* 11.

[IN THE COURT OF APPEAL.]

GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

Trade Union—Member of Union—Workman—Debt due to Union, Recovery of—Unlawful Means for Lawful Object—Molestation—Interference with Employment—Threatening Employers—Trade Union Officers, Liability of—Combination to injure Workman—Illegal Conspiracy—Threats by single Individual—Damage—Principal and Agent—Liability of Trade Union for Wrongful Acts of Agents.

Two or more persons, such as the officers of a trade union, who, by virtue of their position, have special power to carry out their design, are not justified in combining to prevent, and in fact preventing, a workman who is or has been a member of the union from obtaining any employment in his trade or calling, to his injury, merely with the object of enforcing payment of a debt due from him to the union. Not only are such persons themselves liable to the workman for the injury so caused by them, but the union is also itself liable for the wrongful acts committed by them as its agents: *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259; *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. 526.

A combination of two or more persons, without justification, to injure any workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable: *Quinn* v. *Leathem*, [1901] A. C. 495. What is a justification must depend upon the circumstances of the particular case.

Per Romer L.J.: Even if a single individual who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not

(1) 5 Q. B. D. 188.

justifying the acts against the man, then that individual is liable to the man for the damage consequently suffered: *Quinn* v. *Leathem*.

Mogul Steamship Co. v. *McGregor, Gow & Co.*, [1892] A. C. 25, *Allen* v. *Flood*, [1898] A. C. 1, and *Quinn* v. *Leathem* considered.

THE action was brought by James Giblan, a labourer, residing at Newport, Mon., against the National Amalgamated Labourers' Union of Great Britain and Ireland, Harry W. Williams, its general secretary, and John Toomey, its local secretary at Newport, claiming damages for loss of wages; also an injunction to restrain the defendants respectively, or their agents or coadjutors, (*a*) from interfering in any manner howsoever with any person or persons, company or corporation, with a view to causing such person or persons, company or corporation, to break his or their contract or contracts with the plaintiff, or to cease to employ him, or to abstain from entering into contracts with him; (*b*) from preventing, or attempting to prevent, any person or persons from working with the plaintiff; and (*c*) from otherwise molesting or interfering in any manner with the plaintiff in following his calling.

The defendants, the union, were a trade union established in 1889 and registered under the Trade Union Acts, 1871 and 1876. For the purposes of its organization, government, and management the union passed certain rules which were duly registered in pursuance of the Acts. Rule 1 stated that the head office should be in Swansea, in the county of Glamorgan, and (sub-rule 3) that the principal objects of the union were (inter alia), "To improve the condition and protect the interests of all classes of labourers of either sex," and "To regulate the relations between workmen and employers." Rule 2 provided for the "Government of the union," sub-rule 1 stating that "For the supreme government of the union, there shall be an annual general meeting." Then rule 3 provided for the "General management of the union." Sub-rule 1 of that rule stated that "For the general management of the union there shall be an executive committee, consisting of the president of the union, general secretary, and seven representatives chosen by the annual meeting." Sub-rule 4 defined

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

the powers of the executive committee as follows: "The powers of the executive committee shall be limited to the management and superintendence of the union. It shall take every means to secure the observance of the union's rules, to perform all duties allotted to it by the said rules, to further the objects of the union, and to protect its funds from misappropriation. It shall direct the action of the trustees, and be responsible for the right administration of all the funds. It may suspend, expel, and prosecute any member obtaining benefits by misrepresentation or improperly receiving the same. It shall diligently fulfil the duties prescribed for the protection of members. It shall represent them in disputes about hours and wages, and administer the protection fund in the manner laid down in rules 13 and 14. It shall decide the claims and regulate the affairs of superannuation as specified in rule 12. It shall have power to determine questions on which any rule is silent. It shall institute legal proceedings on behalf of the members of the union, and direct the trustees to prosecute any officer of the union, or member or other person who appropriates, misapplies, or withholds the funds of the union. It may remove any incompetent or insubordinate officer. It may suspend, expel, and prosecute members acting contrary to rules. It shall have authority to reverse the decision of a branch, or of a district joint committee, to decide appeals made by members, which decision must be final, to appoint special auditors to examine at any time the books and accounts of a branch, or any account relating to the union's funds. It shall cause the general secretary to present, when instructed, a quarterly financial statement. The resolutions voted on at each meeting of the committee shall be printed and issued to the branches; it shall also be responsible for the due issuing of the yearly report, and for the requisite arrangements for holding the annual general meeting. It shall provide all branches with necessary and uniform books and stationery at cost price. It shall direct the labours of the general secretary for the best interests of the union. . . . The executive committee shall have power to appoint delegates to represent the union at conferences and other meetings. The

decision of the executive committee shall be binding on members and branches. In the absence of the executive committee the general secretary shall have full power to take any action for the executive committee that these rules allow, and report such action to the next executive committee meeting."

Rule 4 provided for the appointment and duties of the general secretary, and stated (inter alia), by sub-rule 3, that "The general secretary shall obey the orders and be under the control of the executive committee."

Rule 9 dealt with the "Funds of the union," and provided, by sub-rule 1, that "Each branch shall, through the trustees and in the name of the union, deposit in the union's bank or in the Post Office Savings Bank, or invest . . . . the funds of the union which it has in its possession, excepting a sum sufficient to meet the current demands (but not exceeding 20*l.*), which shall be retained by the treasurer"; and, by sub-rule 2, that "The executive committee or general secretary shall institute legal proceedings against any member, person or persons misapplying, withholding . . . . any part of the funds, for the recovery of the same, and the punishment of such member, person or persons."

Rule 14 provided for the "Protection of the rights and labour of bodies of members." Sub-rules 1 and 2 thereof were as follows: "1. In any movement approved of by the executive committee or general officers, against a reduction of wages or an increase of hours, or for an increase of wages and a reduction of hours, or any movement to remove or resist any unjust conditions of labour, the union shall assist in the conduct of such movements, but there must be no cessation of work without the authority of the general officers." "2. In the event of failing to effect a settlement by reason and argument, the executive committee or general officers shall have power to sanction or order members to cease work with a view to force a settlement."

The facts leading to the commencement of the present action were as follows:—

In or about the year 1891 the plaintiff, who was at the time

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

a riveter employed in the business of repairing ships, became a member of the defendant union. He lived at Newport, Mon., where there was a branch of the union, and ultimately he became treasurer of that branch, holding that office in 1896 and 1897. In 1899 some difficulties arose with reference to his accounts; and it was alleged that he had retained a sum in hand of about 38*l.*, which should have been handed over to the society. He was seen by the general secretary, the defendant Williams, in reference to the matter, and on September 28, 1899, an agreement was signed by which he admitted his indebtedness to the society in a sum of 36*l.* 9*s.* 2*d.*, and agreed to pay this by 10*l.* on October 9, 1899, and 1*l.* a month until the whole debt was liquidated. As he failed to carry out this agreement an action was brought against him in the county court, at the instance of the union, in December, 1899, when judgment was obtained against him for the amount of the arrears payable under the agreement, which at that time amounted to about 11*l.* By the judgment he was ordered to pay 5*l.* forthwith, and the balance of the amount by instalments of 1*l.* per month. Shortly afterwards he paid 4*l.*, but after making that payment he failed to make any further payments under the judgment or the agreement.

On February 5, 1900, whilst the plaintiff was engaged at work at the Prince of Wales Dry Dock at Swansea, the defendant Williams went to the foreman and gave him notice that unless the plaintiff was dismissed the other union men who were employed there would be called out on strike. In consequence of that the plaintiff's employers discharged him, and for some two or three weeks he was out of employment. After that, however, he again obtained employment, and was in full work until nearly the close of the year 1900. Meanwhile, he had made no payments in respect of the amount he owed the union, and in June, 1900, a judgment summons was issued against him at the instance of the union in the county court, claiming that 11*l.* was due from him. This proved to be an error, and the summons was dismissed with costs. This fact, according to the plaintiff's case, irritated the officials and members of the union, and determined them, by the course

they subsequently took, to punish him by preventing him from obtaining employment or from continuing to work if he happened to obtain a job. He was still a member of the union, and had duly paid his contributions as such. In August, 1900, his position in relation to the union, and his indebtedness to that body, came up for consideration at the annual general meeting of the union, which took place on August 6, 7, and 8, at the town hall, Newport, when a resolution for his expulsion was passed, which was embodied in the following minutes: "The general secretary explained what he had done in this matter, and the position at present. He said that Giblan seemed determined not to pay back to the society his defalcations, but was putting it to all the trouble and expense he could. After the whole of the facts had been stated, it was moved by brothers J. Burns and Kenny, 'That, after hearing the general secretary's statement re Giblan's actions, and the amount of his defalcations, he shall be expelled from this union and shall only be allowed to rejoin by paying to the society such moneys as are due, being defalcations when treasurer of Newport No. 4 branch. The terms of payment to be arranged with the general secretary on the basis of this resolution.'"

The plaintiff having thus been expelled from the union, the defendant Williams, on August 11, 1900, wrote to the then treasurer of the Newport branch, informing him of the resolution, and requesting him to post by registered letter to the plaintiff a notice of his expulsion, also requesting him to consider the plaintiff a non-member, and so to inform the members of that and other branches, and to post up in the club-room a notification that he was not a member, and that he must be treated by the members as a non-unionist until further orders. Notice of expulsion was accordingly sent to the plaintiff. At a district joint committee meeting held at Newport on October 13, 1900, several union men were fined for working with the plaintiff as being an expelled member.

On December 29, 1900, the plaintiff was in employment at Newport, when the defendant Toomey, the union's local secretary there, went to his employer and gave him notice

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

that unless the plaintiff was discharged other men in the employment would be called out by the union; and Toomey also gave notice to the other men, being members of the union, that if they worked with the plaintiff they would be called out. Consequently the plaintiff was discharged. In a similar way, on four subsequent occasions, at Newport, Sharpness, and Swansea, the last occasion being on April 19, 1901, once through the intervention of the defendant Williams, and thrice through that of the defendant Toomey, the plaintiff was prevented from retaining employment, in each case notice being given to the union men in the employment that if they worked with the plaintiff they would be called out. It appeared that another ground for those proceedings against the plaintiff was that he, a non-unionist, was obtaining employment when union men were out of work.

Between November, 1899, and the commencement of the present action several resolutions were passed relating to the plaintiff and his various defaults, and as to what was to be done in respect of them. Some of these resolutions were passed at meetings of the executive committee of the union, held at the general office at Swansea, and others were passed by the Newport branch and recorded in the district minute-book.

At a meeting of the executive committee of the union, held at the general office on April 29, 1901, the plaintiff's position and conduct were again under consideration, the minutes of the meeting containing the following entry: "The general secretary reports that we had again some trouble in Swansea and Newport with James Giblan, but we had been successful in each case."

On August 15, 1901, the plaintiff issued the writ in this action claiming the relief above mentioned.

The statement of claim contained, in paragraphs 3 to 7, the following allegations or counts:—

"3. The defendants Williams and Toomey, in doing the acts hereinafter complained of, acted in unison, and each for and with the other, and as the agents and by direction of the said union.

"4. The defendants have unlawfully and maliciously, and with intent to injure the plaintiff, conspired and procured certain persons who had entered into contracts to employ the plaintiff as a labourer to break such contracts."

That count was, however, abandoned at the trial.

"5. The defendants have also, with intent to injure the plaintiff, unlawfully and maliciously together and also with others (whose names are unknown to the plaintiff) conspired to induce and have induced certain persons not to enter into contracts with and employ the plaintiff.

"6. The defendants have also unlawfully and maliciously, and with intent to injure the plaintiff, conspired to induce and have induced certain workmen in the same employment as the plaintiff to refuse to work with the plaintiff, and to threaten to leave their employment and break their contracts with their employers if the employers continued to employ the plaintiff.

"7. The defendants have also unlawfully and maliciously, and with intent to injure the plaintiff, by intimidation induced the said employers and prospective employers of the plaintiff and the said workmen to do the acts complained of as aforesaid."

The plaintiff then gave "particulars" of the matters complained of, consisting of the six specific instances above mentioned of interference with him in his calling, that is to say, the one preceding and the five following his expulsion from the union; adding that the defendants had also circulated notices generally amongst employers of labour in South Wales that the plaintiff was not to be employed under pain of other workmen being called out in like manner, and that they had also notified other workmen in like manner that they were not to work with the plaintiff under pain of being called out of their employment, though details of this the plaintiff said he was then unable to give.

The union by their defence denied the plaintiff's allegation in paragraph 3 of the statement of claim, and in the alternative stated that they did not authorize or direct the defendants Williams and Toomey, or either of them, to do the acts therein referred to or any of them; and that if those defendants did any of the said acts, which was not admitted, such acts were

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

beyond their powers and beyond the powers of the officials of the union, as a registered trade union, to do or to authorize and direct to be done, and that they, the union, were not liable for the said acts. The union also counter-claimed 25*l.* as the sum then due to them from the plaintiff under his agreement of September 28, 1899.

The defendants Williams and Toomey also delivered a joint defence, in which they simply denied the plaintiff's allegations.

In his reply, joining issue with the defendants upon their respective defences, the plaintiff admitted that he was indebted to the union in the 25*l.* counter-claimed, and submitted to judgment for that sum.

The action was tried at Cardiff before Walton J. with a jury, when after hearing a considerable amount of evidence (the effect of which is stated in the judgments of the Court of Appeal) the learned judge left the following questions to the jury: (1.) Did the defendants Williams and Toomey, acting together or individually, call out the union men or threaten to call them out unless the plaintiff was stopped? (2.) If they or either of them did, did they or he by so doing prevent, or endeavour to prevent, the plaintiff from getting employment or retaining his employment? (3.) Was this done in order to compel the plaintiff to pay the arrears of his defalcations? (4.) Was it done in order to punish the plaintiff for not paying such arrears? The following alternative questions were also submitted to the jury in the event of their answering the above questions in the affirmative: (5.) Was what the defendants Williams and Toomey, or either of them, did only to warn the employers that the union men would leave in consequence of union workmen being unwilling to work with the plaintiff? (6.) Was this done in consequence of the union men objecting to work with the plaintiff? (7.) What damages, if any? The jury answered the first three questions in the affirmative, and the fourth also as regarded Williams, but in the negative as regarded Toomey. Their replies to the alternative questions were in the negative, and they assessed the damages at 100*l.*

Subsequently, in a considered judgment, the learned judge discussed the legal effect of the findings of the jury, and

eventually came to the conclusion that the defendant Williams was individually liable to the plaintiff for the acts complained of, but he gave judgment for the other defendants, the union and Toomey. Upon the counter-claim judgment was given for the union for the 25*l.*, with costs.

The plaintiff appealed against so much of the judgment as refused the relief he claimed by his action.

The defendant Williams did not appeal from the judgment against him.

The appeal was heard on June 18, 25, and 29, 1903.

B. Francis-Williams, K.C., A. J. David, and *Trevor Lewis,* for the plaintiff. It was argued below for the defendants, Williams and Toomey, that they did not go to the plaintiff's employers and demand that they should discharge the plaintiff, but that they only went to the employers to give them the information that the men had a very strong feeling about the plaintiff's conduct. There was no evidence that the defendants induced persons to break their contracts with the plaintiff; he was a day-labourer, and could be discharged at the end of any day. But there remained the charge that those defendants prevented the plaintiff from obtaining employment. Their object was to punish the plaintiff for his misappropriation of the money of the union, and in seeking to attain that object, they did what the jury found to be illegal, namely, they threatened his employers. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) there had been no illegal act.

[ROMER L.J. Does rule 14 (1.) of the union's rules apply to preventing the employment of a non-unionist?]

Yes. They would consider that an "unjust condition of labour," within the rule.

[ROMER L.J. The defendants took proceedings against the plaintiff on special, not on general grounds—not because he was a non-unionist, but because he did not make good his defalcations.]

The grounds were, (1.) that he did not pay up, and (2.) that

(1) [1892] A. C. 25.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

after his expulsion he was getting work when union men were out of employment.

[ROMER L.J. Was it suggested that the union had embarked in a crusade against working with non-union men?

S. T. Evans, K.C., for the defendants. No such suggestion was made.]

Other members were fined for working with the plaintiff.

[ROMER L.J. Was that because he was a non-unionist, or because of the special reason for his expulsion?]

For the former reason. No one was to work with the plaintiff at all, and the men who did so were fined for doing it. The action of the executive committee came within the provisions of rule 1 (3.), for, from their point of view, they were "protecting the interests" of labour. Rule 3 (4.) speaks of forwarding the "best interests of the union" without any limitation, and of "furthering the objects of the union." The general secretary has power to act for the executive committee. Here the executive committee, acting by Williams and Toomey, or, at any rate, by Williams, did what came within that rule, and the union is liable for their acts. In *Temperton* v. *Russell* (1) the law was thus expressed by Lopes L.J.: "A combination by two or more persons to induce others not to deal with a particular individual, or enter into contracts with him, if done with the intention of injuring him, is an actionable wrong, if damage results to him therefrom." There was such a combination in the present case.

[VAUGHAN WILLIAMS L.J. referred to *Quinn* v. *Leathem*. (2)]

The defendants, Williams and Toomey, conspired to induce the employers not to employ the plaintiff. It does not signify that the object in the mind of Williams was not the same as that in the mind of Toomey. It is not a lawful excuse for such acts that a man owes you money. Upon the findings of the jury it is submitted that Walton J. was wrong in entering judgment for Toomey, and in holding that what was done by him was outside the scope of the objects of the union, and that therefore the union was not liable. The union had powers by

(1) [1893] 1 Q. B. 715, at p. 731. (2) [1901] A. C. 495, 535.

means of which it might do considerable injury to the plaintiff, and it invested its officers with a power by which they did in fact inflict great injury on the plaintiff. The union instructed its agents to take such steps as they might think proper to compel the plaintiff to pay the money which he owed. Power was given to commit a tort, and a tort was committed. The motive is immaterial. In *Quinn* v. *Leathem* (1) Lord Brampton said that the Legislature "has not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful." The judgment of Farwell J. in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2) applies, and that judgment was expressly adopted by Lord Halsbury L.C. (3)

[ROMER L.J. The question is whether the acts complained of were done without justification or excuse—that is, without legal excuse. As regards the union, that depends upon whether the acts of Williams and Toomey were within the scope of their authority.]

It is contended that they acted within their authority. Preventing a man from obtaining employment is covered by *Quinn* v. *Leathem.* (4)

S. T. Evans, K.C., John Sankey, and *Clement Edwards,* for the defendants. The first question is, Had the general secretary any authority, or could he be authorized, to do the acts which are said to be illegal, though it is not admitted that they were illegal? Had the executive committee authority to do the acts? If the men had been called out by the executive committee, a member of the union could have obtained an injunction to prevent them from paying strike pay: *Howden* v. *Yorkshire Miners' Association.* (5)

As to the complaint that the defendants procured the plaintiff's employers to break their contracts with him, that part of his case has been dropped, and in fact there was no procurement

(1) [1901] A. C. 495, at p. 526.
(2) [1901] A. C. 426, at p. 431.
(3) [1901] A. C. at p. 436.
(4) [1901] A. C. 495.
(5) [1903] 1 K. B. 308.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

of breach of contract with the plaintiff. In order that *Quinn* v. *Leathem* (1) may apply, the plaintiff must shew that the defendants endeavoured to prevent persons from employing him with intent to injure him. The powers of the executive committee depend upon the construction of rule 14. In that rule the word "movement" means a movement among the men; not a movement of the executive committee, but one of which they may approve. It has not been suggested that it was the policy of the union to prevent its members from working with non-union men; there is nothing in the rules about that. There is no proof of a conspiracy on the part of the union.

[ROMER L.J. In *Quinn* v. *Leathem* (2) Lord Macnaghten said that "a violation of legal right committed knowingly is a cause of action—that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." If two persons conspire to prevent a man from obtaining any employment and they succeed in doing so, would it be a legitimate justification or excuse that he owed them money and they desired to compel him to pay what he owed?]

It is submitted that that would be a good excuse. Considering what the plaintiff had done, the action of the defendants was legitimate.

The defendants do not dispute that a conspiracy to injure or with intent to injure, and carried on by coercion or molestation, is actionable; but there has been no finding here bringing the case within that proposition. The object of the defendants Williams and Toomey was simply to punish the plaintiff for not paying up what was due in respect of his defalcations: there was no conspiracy between those defendants at all, nor any illegal act whatever. The act of Williams or of Toomey cannot be differentiated from that of Allen, the trade-union delegate, in *Allen* v. *Flood*. (3)

[STIRLING L.J. That was not a case of conspiracy.]

Quite true. The act of neither of these men was an illegal act; calling men out is not an illegal act. (4)

(1) [1901] A. C. 495.
(2) [1901] A. C. 495, at p. 510.
(3) [1898] A. C. 1.
(4) [1898] A. C. at pp. 116–7.

[STIRLING L.J. Do not the acts here amount to "intimidation, molestation, or the procuring of people to break their contracts," within *Mogul Steamship Co.* v. *McGregor, Gow & Co.*? (1)]

In that case there was injury to the plaintiffs, the object being to destroy their competition, yet it was held that the injury was not actionable. Here the act itself is not an illegal act; and, if not, it does not become illegal through a combination to do it by a number of persons (2): *Allen* v. *Flood*. (3) The plaintiff must therefore fail unless he can bring himself within *Quinn* v. *Leathem*. (4) Now in that case the defendants' combination was, not for any purpose of furthering their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. (5) In *Allen* v. *Flood* (6) Lord Herschell points out that a representation or statement by which pressure is exercised is lawful; and then he says: "The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning." That dictum is right and covers the present case. It is true that in *Quinn* v. *Leathem* (7) Lord Lindley disagrees with that dictum; but even assuming Lord Lindley's view to be right, and that *Quinn* v. *Leathem* (4) did not come within *Allen* v. *Flood* (8), yet in the present case there was justification for the threat to strike, even if the threat were illegal; that is to say, the object of the threat was the lawful one of recovering what was due in respect of defalcations. Thus there was a legal object sought to be attained by means which were not illegal; but even if the means were illegal they were justified by the legal object. Intention should not be regarded, for intention is immaterial if the acts themselves are not unlawful: *Kearney* v. *Lloyd* (9), a case which was cited and not disapproved in *Quinn* v. *Leathem* (10); *Huttley* v. *Simmons* (11), cited and approved in *Quinn* v. *Leathem* (12); *Boots* v. *Grundy*. (13)

(1) [1892] A. C. 25, 37.
(2) [1892] A. C. at p. 38.
(3) [1898] A. C. 138.
(4) [1901] A. C. 495.
(5) [1901] A. C. at pp. 500, 506, 511, 512, 514, 520.
(6) [1898] A. C. 129.
(7) [1901] A. C. 538.
(8) [1898] A. C. 1.
(9) (1889) 26 L. R. (Ir.) 268.
(10) [1901] A. C. 540.
(11) [1898] 1 Q. B. 181.
(12) [1901] A. C. 531, 540.
(13) (1900) 82 L. T. 769.

C. A. 1903

[GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

[VAUGHAN WILLIAMS L.J. referred to *Grainger* v. *Hill* (1), *Heywood* v. *Collinge* (2), Addison on Torts, 7th ed. p. 31, Williams on Bankruptcy, 7th ed. p. 46, and *Cotterell* v. *Jones*. (3)]

Those authorities are dealing with an abuse of the process of the Court, such as an action maliciously brought for purposes of extortion. An abuse of the process of the Court is a wrongful act per se: Pollock's Law of Torts, 6th ed. p. 216; Clerk and Lindsell on Torts, p. 523.

Then a further question is this: Supposing the acts of the defendants Williams and Toomey are illegal, are they to be deemed illegal acts on the part of the union? In other words, Do those acts bind the union?

The action is for conspiracy between the union, Williams, and Toomey to injure the plaintiff; but no such cause of action is made out by the pleadings. Neither Williams nor Toomey had any authority from the union, nor was it within the scope of their authority, to commit what was a criminal act; nor is it to be implied from the rules of the union, or from the course of business, that such an act was within the scope of their authority. It is now suggested for the first time that because a man stands in a representative capacity for certain individuals and himself commits a wrongful act, the doing by him of that act involves the conspiracy in it of those individuals. The learned judge apparently treated Williams as being in fact the union, or as one of a number of individuals constituting the union, so that his act was really an act done by him in concert with the union and therefore there was a conspiracy.

[STIRLING L.J. If an unlawful act is committed by an agent in the course of his employment and for his principal's benefit, it is not necessary to prove direct authority by the principal.]

This is an act which the union itself could not have committed within its rules. The jury in their findings did not find that there was an authority by the union to Williams to do

(1) (1838) 4 Bing. N. C. 212. (2) (1838) 9 Ad. & E. 268, 274.
(3) (1851) 11 C. B. 713.

this act, nor did they find any ratification by the union of the act.

[VAUGHAN WILLIAMS L.J. referred to *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1) as to the right to sue a trade union for injury done by its members in concert.]

Here there was no wrong committed by a body of persons acting in concert; and there is no evidence of any conspiracy on the part of the union. A master is not answerable for a wrong committed by a servant unless it arises from an act done under the master's actual or implied authority: Pollock on Torts, 6th ed. pp. 87, 89.

[ROMER L.J. The whole question seems to me to be whether what was done by Williams, the general secretary, was done within the scope of the authority of the union.]

To see what that authority is, it is necessary to look at the rules of the union, the all-important rule being rule 14. There was no "movement" here for the purposes mentioned in sub-rule 1, nor any order by the executive committee under sub-rule 2. There is no evidence that the union knew of anything that was done at the Newport branch, or that they had given their authority for what was done there. The union can no more go outside its rules than a limited company can go outside its memorandum of association: Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4; *Ashbury Railway Carriage and Iron Co.* v. *Riche*. (2) As to acting within the scope of authority, in *Lyons* v. *Martin* (3) it was held that a master was not liable for damage arising from an act of his servant which was itself unlawful and not proved to have been authorized by the master. And in *Poulton* v. *London and South Western Ry. Co.* (4) a railway company was held not to be liable for an act done outside it powers by one of its station-masters. *Limpus* v. *London General Omnibus Co.* (5), there cited, is a different case from the present. In *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (6) the wrongful

(1) [1901] A. C. 426, 439.
(2) (1875) L. R. 7 H. L. 653.
(3) (1838) 8 Ad. & E. 512; 47 R. R. 637.
(4) (1867) L. R. 2 Q. B. 534.
(5) 1 H. & C. 526.
(6) (1872) L. R. 7 C. P. 415.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

act done by the defendants' servant was held to have been done in the course of his employment as servant, so as to make the company responsible. Here the assumed illegal act of Williams was not an act authorized by the union, or one which the union could intra vires have ordered.

Francis-Williams, *K.C.*, in reply. The plaintiff relies upon the statement of the law by Lopes L.J. in *Temperton* v. *Russell* (1), the decision in which was approved in *Quinn* v. *Leathem*. (2) All the elements in *Temperton* v. *Russell* (1) are comprised in the findings of the jury in the present case as constituting a good cause of action. There can be no stronger evidence of conspiracy than the passing by the executive committee of the union of the resolution of April 29, 1901, ratifying all that had been done by Williams and Toomey.

The present case is stronger than either *Limpus* v. *London General Omnibus Co.* (3) or *Dyer* v. *Munday* (4), where the defendant was held liable for the act (a personal assault) of his servant. There was no express authority by the master in that case to do the act, and there is none here. Of course, no trade union would so frame its rules as to authorize its agents, in express terms, to commit an illegal act such as joining in a conspiracy. It is enough if the agent does the illegal act in the course of the union's business. Williams' object was to protect the funds of the union, and what he actually did was merely accessory to that.

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J. After stating the objects of the action, the "particulars" of the plaintiff's complaints, and the findings of the jury at the trial, and reading the observations of Walton J. thereon, and the judgment pronounced by the learned judge, proceeded:—The plaintiff appeals against the judgment in favour of the union and Toomey: there is no appeal by Williams, but this does not debar the union or Toomey from saying that the judgment against Williams is wrong on the findings and admitted facts. Now,

(1) [1893] 1 Q. B. 715, 731.
(2) [1901] A. C. 495.
(3) 1 H. & C. 526.
(4) [1895] 1 Q. B. 742.

in my opinion, the facts, so far as they are material, may be stated thus. [The Lord Justice then stated the facts to the effect given above, and proceeded:—]

There can be no doubt but that the plaintiff Giblan was prevented from getting or retaining work, by reason of the facts which I have narrated, at various works where members of the union were employed, but not elsewhere. On this two questions seem to arise. First, can the action of those who brought about this result be justified by the occasion and purpose? Secondly, if it cannot, who is responsible for it? In my judgment the action of the union cannot be justified, because of the findings in fact by the jury in answer to the fifth and sixth questions. If this had been a case where the union men were refusing to work with a man who had been expelled from the union for disgraceful conduct, and in which the men were unwilling to work with Giblan, it is quite possible that there might have been a good defence; but this is not such a case. It is a case in which the union and its officers were acting independently of the men.

There remains the question of the liability of the union and Toomey. I think they are both liable. The union, Williams, and Toomey were all parties to acts constituting an actionable wrong—namely, interference with Giblan in the exercise of his undoubted common law right to dispose of his labour according to his will. It is said that the rules did not authorize the acts of Williams and Toomey; but, be that how it may, the acts were not ultra vires of the union but only of its officers, and the union in general meeting undoubtedly adopted the acts of Williams and Toomey and took the benefit of them.

Then, as to the motive of Toomey, it seems to me unimportant. He undoubtedly did an actionable wrong to Giblan in interfering with his right to dispose of his own labour, and the absence of desire to punish Giblan or to recover money from him which he owed does not get rid of a clear actionable wrong, which would arise without proof of actual malice. I am, therefore, of opinion that this appeal must be allowed.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

ROMER L.J. What are the facts of this case as stated by Walton J. and found by the jury? In effect they are that the defendants Williams and Toomey, as officers of the defendant union, had, by virtue of their position, control over the men of the union, and consequently power to influence employers by calling out or threatening to call out the men unless the demands of the defendants Williams and Toomey were complied with; and accordingly that the defendants combined to prevent, and did prevent, the plaintiff from getting or retaining employment by calling out or threatening to call out the men; and, further, that this caused damage to the plaintiff to the extent of 100*l.*, and the jury negatived the suggestion that what the defendants did, first, was only to warn the employers that the men would leave in consequence of the men objecting to work with the plaintiff; and, secondly, was done in fact in consequence of the men objecting to work with the plaintiff. Lastly, it is found that the defendants acted as they did in order to compel the plaintiff to pay the arrears of some moneys due from him to the union.

The question then is whether, on these facts, the defendant Toomey ought not to have been held liable to the plaintiff, as well as the defendant Williams who was also found to have been actuated by a desire to punish the plaintiff for not paying the arrears. Now, since the decision of the House of Lords in the case of *Quinn* v. *Leathem* (1), I take it to be clear, even if it had not been clear before, that a combination of two or more persons, without justification, to injure a workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable. But, although I think there is no difficulty in stating the law, I fully realize that considerable difficulty may often arise in particular cases in ascertaining what is a "justification" within the meaning of my statement. As to this, I can only say that regard must be had to the circumstances of each case as it arises, and that it is not practically feasible to give an exhaustive definition of the word to cover all cases; and I would refer to what I have already said on a similar point in the judgment I have just

(1) [1901] A. C. 495.

delivered in the case of the *Glamorgan Coal Co.* v. *South Wales Miners' Federation.* (1) I will only add that I do not think any excessive practical difficulty would arise in directing a jury on the point in any particular case; and I may refer, as illustrating this, to the direction given to the jury by FitzGibbon L.J. in the case of *Quinn* v. *Leathem.* (2)

In the case now before us I cannot say that I feel any difficulty in applying the law as regards the defendant Toomey. For, on the facts, I have simply to determine whether two or more persons, who by virtue of their position have special power to carry out their design, are justified in combining to prevent, and in fact preventing, a workman from obtaining any employment in his trade or calling, to his injury, merely because they wish to compel him to pay a debt due from him. In my opinion they are not justified; and consequently the defendants Toomey and Williams are, in my opinion, liable to the plaintiff for the damage suffered by him through the conduct of the defendants.

I may point out, with reference to some observations made in the course of the argument, that this is not a case where the defendants, knowing of the plaintiff's defalcations, thought it their duty to warn employers as to the plaintiff's character, or where the plaintiff's fellow-workmen, by reason of that character, declined to work with him. The findings of the jury negative any such case. And, further, I desire to add, with reference to an argument addressed to us on behalf of the defendants, that the intent on the part of the defendants Williams and Toomey to injure the plaintiff appears from the findings of the jury. The intent of the defendants was to prevent the plaintiff's obtaining or retaining employment, in order to compel him to pay a debt due from him; and from this the intent to injure the plaintiff appears to me to follow.

But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment,

(1) Ante, p. 545. (2) [1901] A. C. at p. 500.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

Romer L.J.

if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action. And I think this view is borne out by the views expressed by the members of the House of Lords who decided the case of *Quinn* v. *Leathem*. (1)

The remaining question is as to the liability of the defendant union. That depends upon whether, if the acts complained of had been done by the executive committee, the union would have been liable. I have come to the conclusion that the union would have been liable on the principle stated in *Barwick* v. *English Joint Stock Bank* (2)—that the acts were done in the service and for the benefit of the union.

STIRLING L.J. The findings of the jury in this case, even when taken most favourably for the defendants, appear to amount to this—that the defendants Williams and Toomey, acting together, prevented or endeavoured to prevent the plaintiff from being employed, by threatening his employers that the union men would be called out on strike unless they dismissed him (which those employers could do without breach of any contract between them and the plaintiff), and that Williams and Toomey so acted with the object of compelling the plaintiff to pay the arrears of his defalcations as a former officer of the union.

I shall first consider the case as against the defendant

(1) [1901] A. C. 495. (2) L. R. 2 Ex. 259.

Toomey, which appears to turn on the question whether he and his co-defendant Williams have been engaged in an unlawful conspiracy.

In the case of *Mulcahy* v. *Reg.* (1) Willes J. (advising the House of Lords) defined a conspiracy as consisting in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. In this case I assume that the defendants agreed to do what they did for a lawful object, namely, to obtain payment from the plaintiff of what he owed to the trade union. It must then be made out that they sought to do so by unlawful means. It was contended in argument that unlawful means must be such as would be wrongful if committed by a single individual: I cannot agree. In *Mogul Steamship Co.* v. *McGregor* (2) Bowen L.J. states the law thus: "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy." This view of the law has been recognised in the House of Lords in the same case on appeal (3), and also in *Quinn* v. *Leathem* (4), particularly by Lord Macnaghten (5), by Lord Brampton (6), and by Lord Lindley. (7) Lord Brampton further says (8): "The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain

(1) (1868) L. R. 3 H. L. 306, 317.
(2) (1889) 23 Q. B. D. 598, 616.
(3) [1892] A. C. 25.
(4) [1901] A. C. 495.
(5) [1901] A. C. at pp. 510–11.
(6) [1901] A. C. at pp. 529–31.
(7) [1901] A. C. at p. 538.
(8) [1901] A. C. at p. 528–9.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

Stirling L.J.

an action special damage must be proved." This agrees with what is laid down by Bowen L.J. in the last sentence cited above, and is supported by the case of *Barber* v. *Lesiter* (1) to which Lord Brampton refers. In the present case damage has been found by the jury.

The question then arises whether the preventing the plaintiff from obtaining employment, by threats of calling out the union men unless he was dismissed, is an unlawful act on the part of Toomey and Williams acting in combination; and in considering this question there must be borne in mind the observation of Bowen L.J., just quoted, as to the necessity of using great care not to extend too far the doctrine of illegal conspiracy. In the *Mogul Case* (2) it was decided that acts done by traders in the exercise of their right to carry on a legal business were not illegal, although highly detrimental to another trader engaged in a similar and competing business. Fry L.J. puts the matter thus (3): "The right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition." So also every workman is entitled to dispose of his labour on his own terms; but that right is conditioned by the right of every other workman to do the like. In particular, each employee is, as I think, at liberty to decide for himself whether he will or will not work along with another individual in the same employ; and if all the workmen but one determine that they will not continue their labour in company with that one, they may inform their employer of their decision. On this I refer to what was said in *Allen* v. *Flood* (4) by Lord Watson (5) and Lord Davey. (6) Those who desire to exercise such a right must indeed proceed with care, for the law forbids in this connection various classes of acts. I think, however, that it is unnecessary on this occasion to discuss this part of the subject, for the fifth and sixth findings of the jury appear to me to negative any suggestion

(1) (1860) 7 C. B. (N.S.) 175.
(2) [1892] A. C. 25.
(3) 23 Q. B. D. 625.
(4) [1898] A. C. 1.
(5) [1898] A. C. at pp. 98–9.
(6) [1898] A. C. at p. 173.

that the acts of Williams and Toomey were done on behalf of the fellow-labourers of the plaintiff, or in exercise of any right of theirs to withdraw themselves from an employment in which he took part. These acts were directed to inflict harm on the plaintiff by preventing him from obtaining or retaining employment, and consequently from earning his livelihood in the only way in which he could do so. By their acts they, Williams and Toomey, caused him as serious an injury as can well be done to a working man; and that injury resulted in damage. They did those acts from time to time, as the plaintiff succeeded in obtaining employment, by going to his employer and threatening that they would resort to the powers which were, or were believed to be, vested in them as officers of a trade union, and which involved a resort to the power of numbers in a way which might and probably would cause detriment to the employer. It may, in my opinion, be fairly inferred from the evidence that this course of conduct was intended to be continued until the plaintiff made terms satisfactory to the trade union. Such acts, so persisted in, seem to me to be in the nature of molestation or coercion; and although they do not involve recourse to physical force, I am far from satisfied that they are not such as to be illegal, even if done by a single individual. Fry L.J. in the same judgment in the *Mogul Case* (1) says: "I do not doubt that it is unlawful and actionable for *one man* to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction *or moral intimidation*." It is unnecessary, however, to decide this point, for these acts which inflicted injury on the plaintiff, resulting in damage, were done by two persons in combination, and amounted to an interference with the plaintiff's rights no less serious than that which was the subject of the action of *Gregory* v. *Duke of Brunswick* (2), a case which has been treated as an authority in the House of Lords in *Quinn* v. *Leathem*. (3) It was there held that a conspiracy to hiss an actor off the

(1) 23 Q. B. D. 626. (2) (1843–4) 6 Man. & G. 205, 953.
(3) [1901] A. C. at p. 503.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

Stirling L.J.

stage, and so injure him in his trade or calling, was illegal, and that acts done in pursuance of such a conspiracy were not excused by shewing that the actor was an unfit person to appear before the public. So here, the acts of the defendants Williams and Toomey were not excused, in my opinion, by the fact that the plaintiff had been guilty of defalcations and owed a considerable sum to the trade union. I do not in the least extenuate the wrongs suffered by the trade union at the hands of the plaintiff: I think he behaved badly and the trade union shewed him great forbearance: still, even a criminal ought not to be persecuted but to be punished according to law. If the plaintiff was guilty of a criminal offence he might and ought to have been prosecuted, in which case the appropriate punishment would have been meted out to him by a legal tribunal. If he failed to pay a just debt, the law provides ample means for enforcing payment of it. In certain cases, though not universally, the non-payment of a debt is punishable by imprisonment. The plaintiff might possibly have been punished in this way: an attempt to punish him was made and was defeated on technical grounds only; but, so far as I can see, the attempt might have been repeated with a fair prospect of success. This was not done, but Williams and Toomey adopted the course which has resulted in the present action. If the existence of the default or debt were admitted as a valid excuse for depriving a defaulter or debtor of his employment, a punishment might be inflicted on him far greater than that which is allowed by law.

I come, therefore, to the conclusion that the defendants Williams and Toomey were guilty of a tort in respect of which they are liable to the plaintiff in this action; and I pass on to consider whether the defendants, the trade union, are also liable.

Now, Williams and Toomey were the servants and agents of the trade union; and the principle which governs the liability of the last-named defendants for the acts of their agents is expressed with great clearness by Willes J. in delivering the judgment of the Court of Exchequer Chamber in

Barwick v. *English Joint Stock Bank.* (1) He says: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." This principle was expressly held to be applicable to trade unions in *Taff Vale Ry. Co.* v. *Amalgamated Society of Engineers.* (2)

It is, then, to be inquired whether Williams and Toomey committed the acts complained of in the course of the service of the trade union and for the benefit of that body. Under the rules of the union it was part of the duties of the executive committee to protect its funds from misappropriation, with power to prosecute any officer of the union or member or other person who appropriated, misapplied, or withheld the funds of the union. The executive committee clearly had power to direct the officers of the union to recover the funds misappropriated by the plaintiff. Further, in the absence of the executive committee, Williams, the general secretary, had full power to take any action for the executive committee that the rules allowed. It must be taken that Williams and Toomey, in doing what they did, were acting as officers of the union charged with the duty of recovering the misappropriated fund from the plaintiff. What they did was a tort. Further, it was committed for the benefit of the union. It seems to me that all the conditions pointed out by Willes J. were satisfied. It was said, however, that the acts of the defendants Williams and Toomey were beyond the powers of the executive committee as defined by rule 14. It may be that, if a member of the trade union had applied to the Court to interfere by way of injunction to restrain those two defendants from committing the acts of which the plaintiff complains, the Court would have seen its way to interfere, on the principles laid down in *Howden* v. *Yorkshire Miners' Association* (3); but the question is a different one when the plaintiff complains of a wrong which has actually been committed by the agents of the trade union. The case of *Poulton* v. *London and South Western*

(1) L. R. 2 Ex. 259, at p. 265. (2) [1901] A. C. 426, at p. 423.
(3) [1903] 1 K. B. 308.

C. A. 1903

GIBLAN v. NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

Stirling L.J.

Ry. Co. (1) was relied on by counsel. It was there held that where the servant of a railway company committed a wrong which the company, under the Acts incorporating it, had no power to do, the company was not liable. There, if all the shareholders of the railway company had met and purported to confer authority on the servant to do what he did, they could not have bound the company. In the present case the members of the trade union are under no such incapacity: if they all concurred they could have conferred authority on Williams and Toomey to do what they did. I think that the present case falls within the principles laid down in *Limpus* v. *London General Omnibus Co.* (2) rather than within *Poulton* v. *London and South Western Ry. Co.* (1), and consequently that the trade union is liable.

I think, therefore, that this appeal ought to be allowed.

[The appeal was allowed with costs, liberty being given to the plaintiff to apply for an injunction, if necessary, to restrain any further wrongful acts by the defendants, or any of them.]

Appeal allowed.

Solicitors: *George David & Evans, Cardiff; Meyrick & Davies, Cardiff.*

(1) L. R. 2 Q. B. 534. (2) 1 H. & C. 526.

G. I. F. C.

THE GUARDIANS OF THE WEST HAM UNION, APPELLANTS *v.* THE GUARDIANS OF THE HOLBEACH UNION, RESPONDENTS.

1903
July 14.

Poor Law—Settlement—Illegitimate Child under Sixteen—Power of Child under Sixteen to acquire Settlement—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A child under sixteen years of age, whether legitimate or illegitimate, may while residing with its parent acquire a settlement for itself under s. 34 of the Divided Parishes Act, 1876, and does not necessarily derive its settlement from its parent.

Reg. v. *Elvet*, (1859) 2 E. & E. 266, followed.

Overseers of Manchester v. *Guardians of Ormskirk Union*, (1890) 24 Q. B. D. 678, not followed.

CASE stated under the Summary Jurisdiction Acts and by consent.

(1.) George Ernest Neep, hereinafter called the pauper, is the illegitimate child of Emma Neep, and was born in the Holbeach Union Workhouse on October 25, 1899.

(2.) Emma Neep, the mother of the pauper, is the illegitimate child of Mary Ann Neep, and was born in the parish of Tilney St. Lawrence on April 11, 1879.

(3.) Mary Ann Neep married Alfred Frederick Chapman at Tilney St. Lawrence on December 23, 1881.

(4.) From June 27, 1890, to September 7, 1893, Alfred Frederick Chapman resided in the parish of West Ham, in the West Ham Union, with his wife for a term of three years in such a manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable therefrom and settled therein.

(5.) From September 7, 1893, the said Alfred Frederick Chapman continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union until his death on September 8, 1894. His wife, the said Mary Ann Chapman, resided with him until his death.

(6.) From September 8, 1894, Mary Ann Chapman (the widow of Alfred Frederick Chapman and mother of Emma

1903

WEST HAM UNION v. HOLBEACH UNION.

Neep) continued to reside in the parish of West Ham, and was in receipt of relief from the West Ham Union from September 8, 1894, until November 28, 1895, when she ceased to reside in the West Ham Union. She died in the Poplar Union Infirmary on October 14, 1896.

(7.) From June 27, 1890, to July 28, 1893, Emma Neep (the mother of the pauper) resided with Alfred Frederick Chapman and her mother, Mary Ann Chapman, in the parish of West Ham, in the West Ham Union. On July 28, 1893, she went into service in the Poplar Union, and has since had no settled residence.

(8.) On December 3, 1901, an order of the justices was obtained on behalf of the respondents (the guardians of the Holbeach Union), adjudging the pauper to be settled in the union of the appellants (the guardians of the West Ham Union).

(9.) The appellants affirm that the settlement of the said Emma Neep cannot be ascertained without inquiring into the derivative settlement of her parent, the said Mary Ann Chapman, and that she must be deemed to be settled in the parish of Tilney St. Lawrence, where she was born.

(10.) The respondents affirm that the said Emma Neep acquired a legal settlement in the said parish of West Ham by reason of the residence therein of the said Alfred Frederick Chapman and his wife mentioned in paragraph 4 of this case, or by reason of the residence of the said Emma Neep for upwards of three years prior to July 28, 1893, in such manner and under such circumstances in each of such years as would, in accordance with the provisions of the several statutes in that behalf, render her irremovable therefrom.

(11.) The question for the opinion of the Court is whether, upon the facts above stated, the said Emma Neep acquired a settlement under the Divided Parishes Act, 1876 (1), in the parish of West Ham, in the West Ham Union.

(1) By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 34, "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire

Montague Lush, K.C. (*W. J. Grubbe*, with him), for the appellants. Emma Neep, the mother of the pauper, never acquired a settlement of her own. It is clear that while under the age of sixteen she was incapable of acquiring a settlement under s. 34 of the Divided Parishes Act, because her case is provided for by s. 35 of that Act, and she had to take the settlement of her mother up to the age of sixteen. As an illegitimate child she retained her mother's settlement until she acquired one of her own. This she never did, and as her mother's settlement was derivative from her husband, Alfred Frederick Chapman, she falls within the last clause of s. 35, as her settlement cannot be shewn without inquiring into the derivative settlement of her mother. She must, therefore, be deemed to be settled in the parish in which she was born. That is the effect of s. 35 of the Divided Parishes Act, 1876, as explained in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1) and *Guardians of Hollingbourn Union* v. *Guardians of West Ham Union.* (2) *Reg.* v. *Guardians of Leeds Union* (3), which seemed to the contrary effect, was disapproved by Lord Herschell in *Guardians of West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green.* (4)

Originally, and except under certain conditions, no person could be removed from a parish in which he had resided for five years. That was provided by the Poor Removal Act,

---

a settlement in some other parish by a like residence or otherwise. . . ."

By s. 35, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(1) (1889) 14 App. Cas. 465.
(2) (1881) 6 Q. B. D. 580.
(3) (1879) 4 Q. B. D. 323.
(4) [1894] A. C. 230.

1903

WEST HAM UNION v. HOLBEACH UNION.

1846 (9 & 10 Vict. c. 66). By the Act of 1861 (24 & 25 Vict. c. 55) three years were substituted for five, and this was reduced to one year by 28 & 29 Vict. c. 79.

The Divided Parishes Act, 1876, took the status of irremovability created by these Acts, and made out of it a new species of settlement by residence. But such settlement is not an actual settlement, but is only conditional upon the person having no other settlement, and only lasts until he acquires a new settlement. A person, therefore, who has a derivative settlement does not acquire the settlement by residence.

C. B. Marriott, for the respondents. Emma Neep acquired a settlement under s. 34 of the Divided Parishes Act by virtue of her residence in the appellants' union. There is nothing to shew that she was incapable of acquiring a settlement for herself by residence, during the time in which she had a derivative settlement from her mother by virtue of s. 35. The case of *Reg.* v. *Elvet* (1) is a distinct authority to the contrary, and it was approved in *Guardians of Reigate Union* v. *Guardians of Croydon Union*. (2) There is no distinction as to the acquisition of a settlement under s. 34 between those who are under and those who are over sixteen years of age. Emma Neep's settlement is therefore not derivative, and the pauper whose settlement is that of his mother is settled in the appellant union.

W. J. Grubbe, in reply. In *Overseers of Manchester* v. *Guardians of Ormskirk Union* (3) it was distinctly laid down that a child under sixteen, whether legitimate or illegitimate, is incapable of acquiring a settlement for itself under s. 35.

LORD ALVERSTONE C.J. I am afraid that I cannot express any great confidence in dealing with these cases of poor law removal, but, as far as I am able to form an opinion, I think on the authorities that the order made by the justices was right. If Mr. Lush had been able to make good his point, that the case falls within the last paragraph of s. 35, his argument

(1) 2 E. & E. 266. (2) 14 App. Cas. 465.
(3) 24 Q. B. D. 678.

would be well founded. If the settlement of Emma Neep was a derivative settlement, then it is clear that both according to the plain words of the section and to the decision of the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1) that settlement cannot be inquired into, and the settlement of the pauper who is her child would be its birth settlement, although the drastic consequences might be that it would be separated from its mother.

But it is contended that this argument altogether overlooks the principle which was recognised in *Reg.* v. *Elvet* (2), and which was not dissented from in the House of Lords, namely, that if Emma Neep had acquired a settlement of her own, then, as it would not be necessary to inquire into her derivative settlement, the only derivative settlement which would be in question would be that which the pauper acquired from his mother, and the order of the justices would therefore be good.

I confess that on a first view of ss. 34 and 35 the argument of the appellants seemed to have great force. Sect. 34 provides that if a person shall have resided in any parish for three years in such a manner as to make him irremovable in each of those years, he is to be deemed to have acquired a settlement in that parish. Now if the general proposition stated by Lord Coleridge C.J. in *Overseers of Manchester* v. *Guardians of Ormskirk Union* (3) is correct, that a child who is under the age of sixteen years cannot acquire a settlement for himself under that section, then of course the respondents' case falls to the ground; but in *Reg.* v. *Elvet* (2) the child in question was in fact under sixteen years of age, and the settlement which was there held to be a good settlement was acquired by the child before attaining the age of sixteen. That is therefore a conclusive authority that a child under the age of sixteen can acquire a settlement. Sects. 34 and 35 seem to to me to point in the same direction, and especially the last part of s. 35, which contemplates a child acquiring a settlement for itself. It may be said that these words are not conclusive; but *Reg.* v. *Elvet* (2) decides that a child under the age

(1) 14 App. Cas. 465. (2) 2 E. & E. 266.
(3) 24 Q. B. D. 678.

1903

WEST HAM UNION v. HOLBEACH UNION.

Lord Alverstone C.J.

of sixteen can acquire a settlement, and the distinction which Lord Watson seems to have taken in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), that the child in *Reg.* v. *Elvet* (2) was only under sixteen during part of the time that the settlement was being acquired, does not seem to be well founded when the facts of that case are examined.

In *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1) Lord Watson (3) expresses the opinion that the effect of s. 35 is (inter alia) "in all cases where the parent's settlement was itself derivative to throw children of either class as soon as they attain the age of sixteen upon their own birth settlement until they acquire another." Does that exclude the possibility of inquiring into what the settlement of the parent was where there are grounds for contending that it had ceased to be derivative? I do not think that it does. I think, therefore, that it was open to the justices to come to the conclusion that Emma Neep had in each of three consecutive years become irremovable within the appellants' union, and so must be deemed to be settled in that union, and that her settlement therefore was original and not derivative, and could be taken by the pauper.

WILLS J. I am of the same opinion. The case seems to narrow down to the simple question whether it is possible for a child under sixteen to acquire a settlement under s. 34. If so, s. 35 has no application to this case, because of the words "until it shall acquire another settlement," and "if any child in this section mentioned shall not have acquired a settlement for itself." It certainly would be odd if the Legislature were to talk of a child acquiring a settlement and yet at the same time to say that no one whom one would call a child was capable of acquiring a settlement. *Reg.* v. *Elvet* (2) seems to me to be a distinct authority for saying that a person under the age of sixteen years can acquire a status of irremovability; and if that is so, then s. 34 operates to turn that status, if maintained for three consecutive years, into a settlement. It

(1) 14 App. Cas. 465. (2) 2 E. & E. 266.
(3) 14 App. Cas. at p. 484.

is no doubt true that in *Overseers of Manchester* v. *Guardians of Ormskirk Union* (1) Lord Coleridge C.J. expressed the view that a person under the age of sixteen could not acquire a a settlement for himself; but I do not think that view can be supported when s. 71 of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), is looked at. It is plain from that section that there is no innate impossibility that a child under the age of sixteen should acquire a settlement. The language of that section would be altogether inept if a child could not acquire a settlement for itself until after it had attained the age of sixteen. I think, therefore, that there is no natural incapacity in a child to acquire a settlement, and, if so, I do not see why it should not be able to do so under the provisions of s. 34.

CHANNELL J. I agree. The only question is whether the settlement of Emma Neep, the mother of the pauper, was derivative or not. If it was derivative, then the last part of s. 35 applies, and the pauper's settlement is clearly the place of its birth. If it is not derivative, then the pauper takes its mother's settlement. I think it is quite clear that Emma Neep's settlement is in West Ham; but is it derivative or not? If she has not acquired a settlement for herself, she has got her mother's settlement. Her mother took her husband's (Chapman's) settlement, and all three of them, the husband, the mother, and Emma Neep, resided in the West Ham Union for three years under such circumstances as to make them irremovable. Chapman resided there for three years before getting parish relief, and so also did his wife; but whether the settlement she thus acquired was an original settlement which she acquired for herself, or whether she derived it from her husband, is a problem which we need not now decide. Whether it was derivative or original, she acquired a settlement in the union of West Ham, and her illegitimate child Emma Neep resided with her in that union for three years, and acquired a status of irremovability in each of those years, although she was then under sixteen. That is the effect of the decision in

(1) 24 Q. B. D. 678.

1903

WEST HAM UNION v. HOLBEACH UNION.

Channell J.

Reg. v. *Elvet.* (1) She resided there with her parents, and the provisions in the earlier Acts which would have prevented her from acquiring that status if she had lived apart from them do not therefore apply. The only question is whether the settlement which she acquired was original or derivative. Did she acquire it for herself by residing there with her mother, or did she get it from her mother? If she had resided there apart from her mother she would not have become irremovable, because the provisions of the earlier Acts would apply. In my opinion, if residence under the age of sixteen is competent to produce irremovability, I think it is also competent to give a settlement under s. 34. No doubt it is a fine and rather difficult point; but on the whole I think that *Reg.* v. *Elvet* (1) is an authority which governs this case, and that therefore Emma Neep acquired a settlement for herself by virtue of s. 34, that her settlement was original and not merely derivative, and that the pauper therefore takes it, and that the order of the justices was right.

Appeal dismissed.

Solicitor for appellants: *F. E. Hilleary.*

Solicitors for respondents: *Callard & Vulliamy, for Richard P. Mossop, Holbeach.*

(1) 2 E. & E. 266.

A. P. P. K.

ANDREWS *v.* RAMSAY & CO.

1903
July 15.

Principal and Agent—Secret Profit—Right to retain Commission.

An agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but is not entitled to any commission from his principal.

APPEAL from the Clerkenwell County Court.

The plaintiff was a builder, and the defendants were auctioneers and estate agents. In June, 1902, the plaintiff, who was the owner of certain property, instructed the defendants to endeavour to find a purchaser for it at the price of 2500*l.*, and he agreed that if the defendants sold at that price he would pay them 50*l.* as commission.

In July the defendants wrote to the plaintiff that a Mr. Clutterbuck had offered 1900*l.* for the property, but this offer the plaintiff refused. Subsequently the plaintiff agreed to sell the property to Clutterbuck for 2100*l.*, the defendants saying that that was the best price they could get. Thereupon Clutterbuck paid to the defendants 100*l.* deposit, and the defendants paid over to the plaintiff 50*l.*, and retained the remaining 50*l.* with the plaintiff's consent as commission due to them.

It subsequently transpired that Clutterbuck and the defendants had had previous transactions with respect to sales of property, and that in this case Clutterbuck had paid the defendants 20*l.* as commission from him. On this coming to the plaintiff's knowledge he brought an action against the defendants to recover this secret commission of 20*l.*, and the defendants paid that amount into court. The present action was then brought to recover the 50*l.* retained by the defendants as commission, and the county court judge gave judgment for the plaintiff.

The defendants appealed.

Neilson, for the defendants. The defendants are entitled to retain the commission. The plaintiff has had the benefit of their services, and it cannot be said that there was a total

1903

ANDREWS v. RAMSAY & Co.

failure of consideration for the plaintiff's promise to pay commission. The plaintiff, by suing for and receiving the 20*l.* paid by Clutterbuck to the defendants, has approbated the transaction. The county court judge relied on the decision in *Salomons* v. *Pender* (1), in which the circumstances were very different. [He also referred to *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2); *Mayor, &c., of Salford* v. *Lever.* (3)]

Chester Jones, for the plaintiff, was not called upon to argue.

LORD ALVERSTONE C.J. In this case an action was brought to recover a sum of 50*l.*, which had been retained by the defendants with the assent of the plaintiff as their remuneration for their services in negotiating the sale of the plaintiff's house. The main point of the case is the suggestion that, because the defendants, while acting as the plaintiff's agents, had received from the purchaser 20*l.* as a secret profit, and because when that was discovered by the plaintiff the defendants had paid over that 20*l.* to the plaintiff, the plaintiff is not entitled to recover back from the defendants the amount retained by them by way of commission. I cannot see how that fact has anything to do with the matter. The 20*l.* was recoverable by the plaintiff from the defendants because it was a secret profit made by them, and came out of the sum which the purchaser would, it may be assumed, have been willing to pay for the house, and it therefore rightly belonged to the plaintiff. That the plaintiff was undoubtedly entitled to the 20*l.* seems to me to have no bearing on the question whether the defendants were entitled to commission from the plaintiff. It is said that the defendants ought not to be called upon to hand over the 50*l.* to the plaintiff because the plaintiff has had the benefit of their services. The principle of *Salomons* v. *Pender* (1) seems to me to govern the case, and it is, in my opinion, amply sufficient to do so. In that case it was held that an agent who was himself interested in a contract to purchase property of his principal was not entitled to any commission from the principal. The principle there laid

(1) (1865) 3 H. & C. 639. (2) (1888) 39 Ch. D. 339.
(3) [1891] 1 Q. B. 168.

1903

ANDREWS v. RAMSAY & Co.

Lord Alverstone C.J.

down is that, when a person who purports to act as an agent is not in a position to say to his principal, "I have been acting as your agent, and I have done my duty by you," he is not entitled to recover any commission from that principal. In *Salomons* v. *Pender* (1) Bramwell B. said: "It is true that . . . . the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say, 'What you have done has been done as a volunteer, and does not come within the line of your duties as agent.'" And in the same case Martin B. quoted the passage from Story on Agency, p. 262, § 210, where it is said: "In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general application, and that is, that, in matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and in many cases, it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may."

It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give 20*l.* more than the price which the plaintiff received, and it may well be that he would have given more than that. It is

(1) 3 H. & C. 639, at p. 642.

1903

ANDREWS v. RAMSAY & Co.

Lord Alverstone C.J.

impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better. The result is that the county court judge was right, and this appeal must be dismissed.

WILLS J. I am of the same opinion; and, whilst I agree with the principles laid down by my Lord, I would like also to point out that under the particular circumstances of this case there is yet another reason why the defendants ought not to succeed. The 50*l.* in question was paid by the purchaser to the defendants as agents for the plaintiff as part of the 100*l.* deposit on the purchase, and the defendants were allowed by the plaintiff to retain 50*l.* in the belief that they had earned that sum as commission. If the money had all been paid over, and the defendants had had to sue the plaintiff for commission, it seems to me perfectly clear that they could not recover it. They would have no chance whatever of succeeding in such an action, and I think that they ought not to stand in any better position because the plaintiff, believing that they had acted properly, had allowed them to retain the 50*l.* The case ought to be the same whether the commission has already been paid or whether the agent has to sue for it.

CHANNELL J. concurred.

Appeal dismissed.

Solicitors for appellants: *Whittington, Son & Barham.*
Solicitors for respondent: *Lewis & Sons.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1903
July 8, 9.

OLIVER *v.* NAUTILUS STEAM SHIPPING COMPANY, LIMITED.

Workman — Personal Injury — Compensation — Damages — "Proceeding" against Employer—Action against Third Person—"Option," Exercise of —Payments by Employer—Receipts "without Prejudice"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 6.

Where, as between an employer and his workman who has received personal injuries in the course of his employment, there is a payment of money to and a receipt given by the workman under the Workmen's Compensation Act, 1897, and the receipt is not qualified either in terms or by a consideration of the surrounding circumstances, that is sufficient to bring the case within the operation of s. 6, and to put the workman in the position of having exercised the option given him by the section —of proceeding, either at law for damages against the person legally liable for the injury, or against the employer for compensation under the Act, but not against both—and so to preclude him from suing the person legally liable.

Semble, per Romer L.J.: Proceedings by a workman against his employer, under s. 6, for compensation for personal injuries, should not be held to irrevocably bind the workman in the exercise of the option given him by the section unless they have resulted in some compensation, as such, being paid to and received by the workman in such a manner as to bind both parties.

A workman, who had been injured in the course of his employment, gave notice of his injury to his employer, but without formally claiming compensation. The employer, by an agent, then made a first weekly payment, for which the workman, who was then in hospital, signed a receipt stating that the sum paid had been received "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on," &c. Upon the employer's agent bringing him the second payment, the workman stipulated that he would only accept that, and all future payments, "without prejudice." To this the agent assented, whereupon the second and subsequent payments were accepted by the workman, he giving on each occasion a receipt in the same form as before but not stating in terms that the payment was "without prejudice." Eventually he refused to accept any further payments from his employer, and brought an action for damages against the person legally liable for his injury:—

Held, reversing the judgment of Jelf J., that, in the circumstances, the reservation of "without prejudice" was applicable to the first as well as to all subsequent payments, so that the first did not irrevocably bind the plaintiff as an exercise of the option given him by s. 6, and thus preclude

C. A.
1903
OLIVER
v.
NAUTILUS
STEAM
SHIPPING
COMPANY.

him from bringing his action against the other person and recovering damages.

Rendall v. *Hill's Dry Docks and Engineering Co., Ld.*, [1900] 2 Q. B. 245, explained.

Little v. *MacLellan, Ld.*, (1900) 2 F. 387, distinguished.

THE plaintiff Oliver was an engine-fitter in the employ of John Rodgers & Co., Limited, ship repairers, at Cardiff, who, in November, 1901, were carrying out repairs on board the steamship *Elm Branch*, belonging to the defendants, the Nautilus Steam Shipping Company, Limited, and then lying in the Roath Basin, Cardiff. On the 26th of that month the plaintiff, by the direction of his employers, went on board the vessel, and while he was working close to the disconnected end of the steampipe from the donkey-engine a man in the employment of the defendants, and in charge of the donkey-engine, suddenly, and without any warning to the plaintiff, started it, with the result that the plaintiff was severely scalded and otherwise injured by the escaping steam, and had to be taken to the Cardiff Infirmary. At the time of the accident the plaintiff was in receipt of wages at the rate of 2*l.* 1*s.* a week. On December 2, 1901, he wrote to his employers from the infirmary informing them of his accident, but not making any formal claim to compensation. At that time he was aware of the existence of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), and that in order to claim compensation under it notice of the accident must first be given to his employers.

On January 8, 1902, the agent of the insurance company, with whom the employers had effected insurance against accidents to workmen in their employ, and to whom they had handed the notice, called upon the plaintiff at the hospital to ascertain his condition, and the plaintiff was also examined by a medical practitioner on behalf of the employers. Subsequently, on January 15, the agent called again and paid the plaintiff 4*l.* 13*s.* 4*d.*, being at the rate of 1*l.* a week for four weeks and four days up to January 11, at the same time handing to the plaintiff for signature a form of receipt as in *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (1),

(1) [1900] 2 Q. B. 245.

stating that the sum had been received from his employers per the insurance company "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on the 26th day of November, 1901." The plaintiff thereupon signed the receipt.

A few days afterwards the delegate for a trade union of which the plaintiff was a member called upon the plaintiff, and cautioned him against accepting any future payments without stipulating that he did so "without prejudice." Accordingly, when the insurance agent next called, on January 22, and tendered the plaintiff 1*l.* as a payment for the week from January 11 to 18, the plaintiff informed him that he could only accept that and any further payments "without prejudice," to which the agent assented, and said he would make a note of it, which he then did in his notebook, and he subsequently informed the insurance company that the plaintiff would only accept payments subject to that qualification. The plaintiff then accepted the 1*l.* and signed a receipt as before, though the receipt did not itself contain the words "without prejudice." On April 1, 1902, the plaintiff left the infirmary. Weekly payments of 1*l.* continued to be made to him upon receipts as before until May 29, when he refused to accept any further payments at all; and on June 5, 1902, he issued the writ in this action against the defendants, the owners of the steamship, claiming damages for personal injuries.

The action was tried at Cardiff by Jelf J. without a jury, the damages being agreed at 375*l.* in the event of the judge's finding in favour of the plaintiff. The learned judge held that the plaintiff was, under the circumstances, debarred by the provisions of the Workmen's Compensation Act, 1897, from pursuing his common law remedy against the defendants, and ordered judgment to be entered for the defendants. The plaintiff appealed.

The appeal was heard on July 8 and 9, 1903.

The question was whether, in accepting the payments in question, the plaintiff had exercised the "option" given him

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

by s. 6 of the Workmen's Compensation Act, 1897, and so precluded himself from bringing the present action.

Sect. 6 is as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person."

S. T. Evans, K.C., and *J. Sankey*, for the plaintiff. The defendants were in the position of "some person other than the employer" within s. 6 of the Workmen's Compensation Act, 1897, and the plaintiff had a right, at his option, to proceed either against them for damages or against his employers for compensation, but not against both. The object of the section is to provide against a double claim for both damages and compensation. There is nothing in the evidence to shew that he exercised this option and elected, by taking the money from his employers through the insurance company, to proceed against them rather than against the defendants. The exercise of an option involves the consideration of two alternatives. Here there is no evidence that when he took the money he was aware that he had any remedy except by action. The fact that he gave notice to his employers of his accident is not sufficient. He was obliged to do that under the Employers' Liability Act of 1880 as well as under the Act of 1897. It has been held in *Powell* v. *Main Colliery Co., Ld.* (1), that even a notice under the Act claiming compensation is not what is technically called a "legal proceeding" at all. Here, the plaintiff made no "claim" whatever, so that it is impossible to say that he ever did "proceed" so as to give up his rights against the defendants. All the receipts must be treated as having been given "without prejudice"; but, apart from that, they did not constitute such

(1) [1900] A. C. 366.

agreements as would debar the plaintiff from pursuing his remedies against the defendants: *Wright* v. *John Bagnall & Sons, Ld.* (1); *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (2) The receipt of money under such a notice as this is not a "proceeding" by the workman nor a waiver of his rights: *Perry* v. *Clements* (3); *Tong* v. *Great Northern Ry. Co.* (4); *Field* v. *Longden & Sons.* (5) In order to prove exercise of the option there must be a proceeding for the recovery of compensation, not a mere notice of injury given in order to enable the workman to take advantage of the Act: *Little* v. *MacLellan, Ld.* (6); *Beckley* v. *Scott & Co.* (7); *Thompson & Sons* v. *North Eastern Marine Engineering Co., Ld.* (8) It is immaterial that he submitted himself to a medical examination, for under Sched. I., rule 3, of the Act he was practically compelled to do so. *Little* v. *MacLellan, Ld.* (6), will, no doubt, be cited by the defendants; but that was a case under a different section (s. 1, sub-s. 2) and the receipts were in a totally different form to those here, for they stated that the sums were received by the workman "in full satisfaction of the amount due to me as compensation." Moreover, the full amount of compensation was paid for the full period of six months. Upon the whole it is submitted that a workman is not making a "claim for compensation" or taking any "proceeding" when he does nothing more than simply accept a sum of money paid to him on account of compensation. Consequently here there has been no exercise by the plaintiff of his "option" under s. 6, and nothing to preclude his ordinary remedy at law.

Abel Thomas, K.C. (*Albert Parsons* with him), for the defendants. *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (2), was a case, not under s. 6, but under s. 2, sub-s. 1; and moreover the question was whether there was a binding agreement between the workman and his employers. (9) But under this s. 6 the question is simply one of "option," quite

(1) [1900] 2 Q. B. 240.
(2) [1900] 2 Q. B. 245.
(3) (1901) 49 W. R. 669; 17 Times L. R. 525.
(4) (1902) 18 Times L. R. 566.
(5) [1902] 1 K. B. 47.
(6) 2 F. 387.
(7) [1902] 2 I. R. 504.
(8) [1903] 1 K. B. 428.
(9) [1900] 2 Q. B. at p. 249.

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

apart from agreement. The employer has nothing to do with the matter. The workman has his own "option," and the question in the present case is whether he has not "proceeded" and so exercised his option. Neither the case last cited nor *Wright* v. *John Bagnall & Sons, Ld.* (1), are material to the present question. When a workman accepts from his employer a weekly sum while incapacitated through injury, knowing that he is receiving it as "compensation," can he be said not to be exercising an option? The Irish case of *Beckley* v. *Scott & Co.* (2) was a case under s. 1, sub-s. 2, and not under s. 6, and was decided on principles not applicable to the present case. Sect. 6 was only referred to by Gibson J. in the Court below and by FitzGibbon L.J. in the Court of Appeal. *Little* v. *MacLellan, Ld.* (3), is on all fours with the present case, except that it was on a section (s. 1, sub-s. 2) which is not nearly so strong as s. 6.

[VAUGHAN WILLIAMS L.J. referred to *Lee* v. *Lancashire and Yorkshire Ry. Co.* (4) as to a receipt for compensation being open to contradiction or explanation.

ROMER L.J. Suppose the workman in the hurry of the moment issues a writ against the person responsible for his injury, and then, ten minutes after the defendant's appearance to the writ, has the action dismissed with costs, would you say he has exercised his option under s. 6?]

Here the workman signed a receipt which is inconsistent with his *not* having exercised his option; and Jelf J. has held that he has in fact exercised it. The actual form of the receipt makes no difference when the question is whether the man has exercised his option. The whole case here shews that the plaintiff was "proceeding against his employer for compensation" within s. 6, and so exercising his option.

[*Ellen* v. *Great Northern Ry. Co.* (5) was also referred to.]

S. T. Evans, K.C., in reply.

VAUGHAN WILLIAMS L.J. In this case Mr. Oliver sues the Nautilus Steam Shipping Company, Limited, for damages on

(1) [1900] 2 Q. B. 240.
(2) [1902] 2 I. R. 504.
(3) 2 F. 387.
(4) (1871) L. R. 6 Ch. 527.
(5) (1900) 49 W. R. 395; (1901) 17 Times L. R. 453.

the ground that he has been injured under circumstances which throw upon the defendants primâ facie a legal liability in respect of the injury which he sustained. It is not in dispute that that is true; but the defendants, who are under this primâ facie liability, rely for their defence upon the 6th section of the Workmen's Compensation Act, 1897. The Act is not very easy to construe. It is an Act as to which I think I may properly say that the difficulties of construction are so great that it is not desirable that judges should decide more than is absolutely necessary for the decision of the particular case before them; and I do not myself propose to do so in the present case.

Now s. 6 says that, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." That is the case here, for the defendants, the Nautilus Steam Shipping Company, Limited, are persons other than the employer liable to pay damages in respect of the injury. The section then proceeds: "the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person." Now, "the said other person" comes here and says that the plaintiff, the workman, has proceeded "against his employer for compensation under this Act": that he has not only proceeded against his employer under this Act for compensation, but has succeeded in obtaining payment of compensation under the Act; and that, under those circumstances, by the very terms of the 6th section of the Act of Parliament, the workman cannot now bring an action against him, the other person legally liable.

I do not understand Mr. Evans to say that, if in this case it were true that the workman had received from his employer compensation, as such, under the Act, he could afterwards sue the other person; but, however that may be, it is perfectly plain, in my judgment, whichever view one may take of the

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

Vaughan Williams L.J.

6th section, that a workman who has received compensation from his employer under the Act cannot afterwards sue the other person. Therefore, the sole question in this case really is, Has Mr. Oliver received compensation from his employer under the Act?

Mr. Evans addressed to us an argument which, I think, was based upon *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (1) He says that in that case, there being a receipt in the identical form of the receipt in this case, it was held that the plaintiff, who had received moneys much in the same way as the plaintiff has in the present case, had not thereby commenced proceedings so as to exempt himself from the operation of the limitation which is provided by s. 2, sub-s. 1, which says: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." Mr. Evans contended that, because the Court of Appeal held in that case that the payment and the presence of the receipt, which was in the same form as that here, were not held to constitute a claim for compensation within the six months so as to oust the operation of the statutory limitation, therefore we ought to say in the present case that there has been no claim under the Act, and no payment under such a claim. I can only say I do not agree with that argument. It must be remembered that, at the time that case was decided, it was supposed, following the law as laid down by the Court of Appeal in *Powell* v. *Main Colliery Co., Ld.* (2), that the claim for compensation, which must be made within the six months, was a claim to be made by a step in legal proceedings, such as filing a claim for arbitration in the county court. Therefore, I shall not further discuss the case of *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (1), because I do not think it at all affects the case before us.

(1) [1900] 2 Q. B. 245. (2) [1900] A. C. 366.

The only question which, as I have already said, we have to decide here, is whether or not, under the Act, there has been money paid by the employer to and received by the workman. Had it not been for the evidence as to the acceptance of payments "without prejudice," which was stipulated for by the workman upon the occasion of receiving the second payment, and which, moreover, was noted by the agent in his book when making that payment, I should have been inclined to say that the action against the person other than the employer could not possibly have been brought, having regard to the terms of s. 6 of the Act. I think the statement which was made by the workman in the hospital as to the payments being accepted by him "without prejudice," and which was assented to by the agent who made the payments, makes all the difference. Mr. Abel Thomas frankly accepted the proposition that if there had been no first payment made without being subject to this expression of "without prejudice," he could not have supported his case here. He accepted the position that the result of the reservation "without prejudice" was that which was described by the learned judge in his judgment, where he says: "I find, as a fact, that the insurance company intended to pay the compensation under the Act, and the plaintiff intended to take it under the Act, but that the plaintiff tried, after the first occasion when he got the 4*l.* 13*s.* 4*d.*, to keep open any other remedy if he could." If that was so, Mr. Abel Thomas was perfectly right in saying that, having regard to all those payments which were made under the reservation "without prejudice," it could not be said that those payments were such as to prevent the plaintiff from suing the third person mentioned in the 6th section of the Act, because those payments were made without prejudice (as the learned judge says) to any other remedy which the plaintiff might have; and I should go further myself and say, "Altogether without prejudice in any respect." Here was an agent standing in the shoes of the employer, and who might be expected to act in the same way that an employer, taking an interest in his workmen, might be expected to act, that is to say, to come to the man lying in a state of suffering, as he then was, and say,

C. A.
1903
OLIVER
v.
NAUTILUS
STEAM
SHIPPING
COMPANY.
Vaughan
Williams L.J.

"You are entitled under the Act of Parliament, if you claim compensation, to receive each week a sum of money bearing the statutory proportion to your wage. Here it is, take it; and take it without prejudice: which means leaving you exactly in the same position as if you had not taken it, and not binding you to retain the money in any way if you, upon rising from your sick bed, should think it better not to accept this money from me, your employer, under the Workmen's Compensation Act, but should elect to take the remedy against the third person who is under the legal liability described in the 6th section of the Act."

Then it seems to me the only difficulty remaining is that which arises in respect of the first payment—that is, the payment which was made upon January 15. That was not made subject to any such reservation as "without prejudice." The real question, then, is, Ought we to treat the first payment as having been made subject to the same condition as the later payments? I think we ought, and for the following reason. After all, a receipt does not in itself create an estoppel of any sort or kind. You are at liberty to take all the circumstances surrounding it into consideration, and ask yourself the question what was the real intention of the parties when the receipt was given and taken. One must not forget, although I am not going to dispute Jelf J.'s findings, that this man understood what he was doing when he gave the receipt—understood, that is, that he was receiving a payment of compensation under the Workmen's Compensation Act. I do not think it would be a fair inference to draw that this man was at that moment in such a state of bodily health and mind that he could really make any election as to what would be the best course to pursue. To my mind, one cannot have a stronger piece of evidence that this is true as to the state of things upon January 15 than the evidence of the acts of the insurance company's agent. What did the agent mean when, upon the next occasion, the following week, he accepted, as he clearly did accept, the receipt which was given subject to the qualification of "without prejudice"? He accepted it upon that occasion, and he accepted it upon all subsequent occasions, subject to

that qualification until the month of May, when the plaintiff refused to receive any more payments. What did the agent think it all meant when he accepted that qualification or reservation? Did he really mean, and did he ask the learned judge who tried the case, and does he ask us now to say, or do those who rely upon his evidence ask us to say, that when this reservation was given and accepted by him, he had it in his mind to say it did not matter whether the plaintiff made a reservation or not, because he had already precluded himself from exercising any further option as to his remedy by his acceptance of the first payment, in respect of which he was content to give a receipt? I do not think the agent would be willing to have that view taken of his conduct. My own view is that, by quietly accepting the reservation or qualification, "without prejudice," which he entered in his book and communicated to his principals, the insurance company, without having made any protest or objection to it to the plaintiff, the agent in fact agreed that the qualification was to override the whole of the receipts. Once you arrive at that conclusion, it seems to me there is an end of the defence set up by the third person here. It may be perfectly true to say that where there is a receipt which, without any qualification, acknowledges the payment of money under the Workmen's Compensation Act, there has been a claim or a proceeding within the meaning of s. 6; but, in my judgment, that cannot properly be so where the receipt for the payment in question is not an unqualified receipt of the money, but a receipt given by a sick man who, at the moment of giving it, expressly states that it is given subject to the qualification of "without prejudice."

In my judgment, this is sufficient to dispose of the case. I think, under those circumstances, the plaintiff was entitled to bring his action; and, as the damages have been agreed, I think we ought to allow this appeal and reverse the decision of Jelf J. and enter judgment for the plaintiff for 375*l*.

I only have to add that I have endeavoured not to express any opinion, or give any judgment, upon any points other than those necessary for the decision of this case, beyond saying

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

Vaughan Williams L.J.

that if there is a payment and a receipt of money under the Workmen's Compensation Act, and that receipt is in no way qualified, I think that is sufficient to bring the case within the operation of s. 6 and to put the workman in the position of having proceeded against his employer for compensation and recovered it. I express no opinion whatsoever upon the other numerous points which have been very properly raised in the discussion of this case before us.

ROMER L.J. I have come to the same conclusion.

To my mind the question upon which this appeal turns is simply one of fact: Had the plaintiff, before he commenced this action, exercised the option given to him by s. 6 of the Workmen's Compensation Act, by proceeding against his employers so as to preclude him, by virtue of the section, from now suing the defendants? The judge in the Court below came to the conclusion that the plaintiff had exercised the option in the sense I have mentioned; but this, to my mind, is chiefly because the learned judge drew certain inferences from the facts of the case, which were really not much in dispute. It is quite open to us, in my opinion, to differ from the learned judge in the conclusion of fact he has come to in this case. This is not like a case where a judge has seen the witnesses and has had to decide a question of fact which depended upon which side the witnesses were speaking the truth, where there was a direct conflict of evidence. In a case where there is a direct conflict of evidence on the main issue of fact, and the judge has seen the witnesses and declared he believes one side and not the other, naturally enough the Court of Appeal would not like to differ from the judge in such a case as that. That is, to my mind, wholly distinct from this case. I think this case is one, as I have said, where the learned judge has proceeded upon certain inferences he has drawn from the facts, and from which facts it is as well open for us to draw inferences as the learned judge in the Court below. I think, therefore, I am at liberty to decide this question of fact for myself upon the evidence; and, looking at the evidence, I come to the conclusion that it would not be right for us to hold that

the plaintiff has precluded himself by what he did from now suing the defendants.

In the first place, I may point out that under s. 6 it cannot, I think, be said that a workman must necessarily be held to have exercised the option given to him as against his employers, or as against the stranger liable, merely because he has taken some proceedings either at law against the stranger or under the Act as against the employer. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman.

Further, I should like to say, for myself, that in dealing with any particular case I should try and look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that, as at present advised, though it is not necessary for me to express a final opinion on the point for the determination of this case, I am disposed to think that proceedings by a workman against his employer for compensation should not be held to irrevocably bind the workman in the exercise of the option given him by s. 6 unless those proceedings have resulted in some compensation, as such, being paid to and received by the workman in such a manner so as to bind both parties.

With those observations I will now deal with the facts of this case. The workman, after he is injured, sends in a notice of injury. That was a proceeding taken, and properly taken, by him by way of caution, and certainly was an innocent act, and one that would not bind him in any way so far as concerns the point involved in this appeal. Now, substantially—putting aside for the moment the question as to the effect of certain payments that have been made to him—beyond sending that notice of injury, the workman did absolutely nothing in this case: he did not make a formal claim; he sent in no notice of claim. The mere fact that a doctor subsequently visited him I only mention to pass it by, because it appears to me to have really no materiality.

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

Romer L.J.

I therefore proceed at once to the question of the payments that were made to the workman. To my mind, it is most material to see how those payments were made, and in what respect they were made, and how they were received by the workman. They were paid in this wise. The man was lying seriously ill. I take it that, although seriously ill and in great pain, he understood sufficiently to know what was passing. An agent comes from the insurance company, who have indemnified the employers and therefore are the persons really liable to pay if the employers are liable, and offers to make a certain payment, something like a weekly payment, to the workman. The agent makes the payment and takes a receipt. That receipt purports to be a receipt of a sum on account of compensation which might be or become due to the workman under the Act. I will take it that the workman knew what was in that receipt, and that he knew he had a claim, or might make a claim, under the Workmen's Compensation Act; but when the receipt is considered, this is, at any rate, clear, that it in no wise bound the employer to any recognition of liability on his part. It left everything open to him except—although I need not decide the question—that it is possible, after the receipt had been given, it might be implied, as between the parties, that a claim was supposed to have been made by the workman under the Act. But the payment was not made, as I have already pointed out, as admitting any liability on the part of the employer, nor can it be taken, therefore, as against the workman, to have been received by him irrevocably, or as having been made on an admission, as between the parties, of liability on the one part and receipt in respect of an admitted right by the workman on the other. It seems to me to have left, even on the form of the receipt, the position of the parties in an indeterminate form. Neither, it appears to me, were absolutely bound by the payment, or by the form of the receipt. But the matter does not end there; after the first payment had been made the agent of the insurers comes again to make a further weekly payment. Now, in the meantime, between the first payment and the second, the plaintiff is informed by an officer of his trade union that

payments ought to be received by him expressly without prejudice; and accordingly, the next payment and all subsequent payments are made to the workman on the terms that they are received by the workman expressly without prejudice. I infer from the fact of the officer of the trade union having come to the workman, and from the other evidence in this case, that between the first payment and the second the plaintiff had been informed of what he was previously ignorant of—namely, that he might have a claim against the defendants, and not necessarily a claim against the employers at all under the Workmen's Compensation Act. At any rate, this is clear, that the second payment and all subsequent payments are made to and received by the workman expressly without prejudice. It is noticeable that no objection is made on behalf of the agent for the insurers to the payments being made and received on that footing. It appears to me that under those circumstances we ought not to consider the first payment to be left standing, as it were, by itself as an isolated and fatal fact, but that we must look and see what subsequently took place. I think the second payment and subsequent payments, which were made expressly without prejudice, shew, under the circumstances, that the parties must, as between themselves, have treated the first payment as not having irrevocably bound the workman, but, for the purpose I am now considering, as having been made also without prejudice.

It is admitted before us that, for the purpose of this appeal, the plaintiff cannot be said to have been at all prejudiced or affected by any of the payments after the first; but it is said, and the learned judge has so decided, that because of that one payment made without anything expressly being said by the workman at the time of payment—notwithstanding the form of the receipt, and notwithstanding the other circumstances—that that first payment and retainer of the money irrevocably bound the workman, and made it impossible for him, notwithstanding all the circumstances, thereafter to say that the defendants remained liable to him, as they undoubtedly were liable, at common law. I think that under the circumstances we ought not to agree with the learned judge in that

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY

Romer L.J.

conclusion. It seems to me that, looking at the substance of this case, justice requires that we should hold that the workman has not irrevocably bound himself by what he has done —that he has not exercised his option under s. 6 in such a manner as to enable the defendants to say that they are free from all liability to the plaintiff under the common law.

I need only say, in conclusion, that in my opinion the case of *Little* v. *MacLellan, Ld.* (1), is perfectly distinct from the present case; in fact, if the judgments of the learned judges who decided that case are examined, it will be seen that they base their decision on grounds which emphasize the distinction between that case and the present. They found there, as a matter of fact, that payments were made to and received by the workman as payments due in respect of an admitted liability, and as a satisfaction pro tanto, as they went on, of the liability under the Act. The circumstances are quite distinct from the present, and, as I have said, the very reasons on which that case was based shew to my mind that, if the learned judges had had to decide the present case, they would have decided it in the way in which we are now doing. At any rate, it forms no authority against the views I am expressing.

I agree, therefore, that this appeal ought to succeed.

STIRLING L.J. I am entirely of the same opinion.

I respectfully differ from Jelf J. on one point. I think, as my brethren do, that he has attached too little importance to the fact that all the payments after the first were made without prejudice. I do not differ from him upon or question any of his findings of fact as they stand; but I think, in the conclusion at which he arrived by way of inference from those findings, he neglected to give due weight to that circumstance, and I agree with the view which my brethren have taken of the case.

I wish, however, to say for myself that, as at present advised, I have great difficulty in seeing how Jelf J.'s decision is reconcilable with the decision in *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (2), which was cited by Mr. Evans.

(1) 2 F. 387.

(2) [1900] 2 Q. B. 245.

That case must be read in connection with the case which preceded it—*Wright* v. *Bagnall*. (1) The latter case I understand to be a decision that, where an agreement is arrived at between the master and the servant, that there is a statutory liability on the part of the master to pay compensation under the Act, but the amount of compensation is left to be settled afterwards by a judge or arbitrator, the employer will not be allowed to set up the defence that no claim was made within six months of the accident. That I understand to be in accordance with the decision in the Scottish case of *Little* v. *MacLellan, Ld.* (2), which has been referred to.

Such being the decision in *Wright* v. *Bagnall* (1), the case of *Rendall* v. *Hill's Dry Docks and Engineering Co., Ld.* (3), occurred shortly afterwards. There what took place was this: apparently no notice of the injury was sent under the Act, nor was any formal claim put forward, but payments were made by an insurance company on behalf of the master, and receipts were taken precisely in the same form as are found to have been taken in the present case. In that state of things the county court judge, before whom the case came, held that a claim for compensation under the Act did not mean only an application for arbitration; he further held that if, having regard to the defence of the appellants, it was open to them to object that the weekly receipts signed by the respondent were not claims for compensation, such receipts were either claims for compensation or were evidence that a claim had been made, and that the appellants, by taking such receipts and paying the weekly sums therein mentioned, either waived a claim for compensation or were estopped from taking their objection. He held, therefore, that the employers were not entitled to set up the objection that no claim had been made within the six months.

I think it is quite true, as has been pointed out by Vaughan Williams L.J., that at that time the decision in *Powell* v. *Main Colliery Co., Ld.* (4), in the Court of Appeal was standing, and the case was decided with reference to that decision.

(1) [1900] 2 Q. B. 240.
(2) 2 F. 387.
(3) [1900] 2 Q. B. 245.
(4) [1900] A. C. 366.

C. A. 1903

OLIVER v. NAUTILUS STEAM SHIPPING COMPANY.

Stirling L.J.

But it does not seem to me that that exhausts the case, because A. L. Smith L.J., who delivered the judgment of the Court, after referring to the receipt, says (1): "Do these circumstances shew a waiver of the six months' limitation, or amount to an estoppel against setting up that defence? Clearly they do not. The case of *Wright* v. *Bagnall* (2) has been referred to. What was the ratio decidendi in that case? There the claim for compensation had not been made within six months of the accident, and the county court judge held, as my brother Collins says, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined. My brother Vaughan Williams seems also, during the argument, to have said what was exactly to the same effect. Where is there any evidence in the present case that the parties agreed that there was any liability on the part of the employers to pay compensation? I can see no evidence of any such agreement." The judgment of the county court judge as to the effect of the receipts was overruled. The evidence before the Court in that case was similar to the evidence which occurs here, and that decision seems to me to constitute a difficulty in the way of upholding the judgment of Jelf J.

I desire to abstain from expressing any opinion as to the true meaning of the word "proceed" in the 6th section of the Workmen's Compensation Act, only saying that it seems to me great weight should be attached to the judgments which have been delivered in the Irish case of *Beckley* v. *Scott & Co.* (3)

Appeal allowed.

Solicitors: *Riddell, Vaizey & Smith, for H. Williams, Neath; Botterell & Roche, London and Sunderland.*

(1) [1900] 2 Q. B. at p. 249. (2) [1900] 2 Q. B. 240.
(3) [1902] 2 I. R. 504.

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
Aug. 4, 6.

GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY, LIMITED.

Insurance, Marine—Round Voyage by Stages—Warranty of Seaworthiness, Breach of—Steamship insufficiently provided with Coal—Burning Ship's Fittings and Cargo—Negligence of Master—"Held Covered" Clause in Policy—Fixing Amount of Premium after Breach of Warranty.

In the case of a voyage policy upon a steamship, where the contemplated voyage must, from its length, be necessarily divided into stages for coaling purposes, the shipowner is, as between himself and his underwriter, under an implied warranty that the ship shall, at the commencement of each stage of the voyage, be seaworthy for that stage, by having on board a sufficiency of coal for that stage.

The plaintiffs insured their steamship with the defendants for a round voyage from the United Kingdom to port or ports on the west coast of South America and back again, with leave to call at any ports or places on the east coast of South America, &c. The insurance included general average. The perils insured against were of the seas, &c., subject to clauses annexed to the policy which provided (inter alia): "This insurance is also to cover loss through the negligence of the master," &c., and "Held covered in case of any breach of warranty, &c., at a premium to be hereafter arranged."

During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. Her coal supply failing between Monte Video and St. Vincent, the master burnt as fuel some of the ship's fittings, spars, and some of the cargo, and if he had not done so she would have been in danger of becoming a total loss. The plaintiffs did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient coal, and no premium had been arranged under the "held covered" clause. In an action on the policy to recover in respect of the loss of the fittings, spars, and cargo:—

Held, that the policy was a "voyage policy," not a "time policy," and that the voyage was divisible into stages, the case thus falling within *The Vortigern*, [1899] P. 140; and accordingly that as the ship had not, at the commencement of the stage from Monte Video, a sufficiency of coal for that stage, the plaintiffs had broken their implied warranty that she was seaworthy for that stage, so that the policy then ceased to attach to the risks insured against.

Decision of Bigham J., [1903] 1 K. B. 367, affirmed.

APPEAL by the plaintiffs from the decision of Bigham J. (1)

(1) [1903] 1 K. B. 367.

C. A. 1903

GREENOCK STEAMSHIP COMPANY v. MARITIME INSURANCE COMPANY.

The facts are fully stated in the report of the case in the Court below.

In the fifth line of the quotation from the policy on p. 368 of the report "South *America*" should be substituted for "South *Africa*."

Carver, K.C., and *Leck*, for the plaintiffs. Assuming that this was a "voyage policy," it is submitted the warranty of seaworthiness (if any) to be implied was only a warranty as to the condition of the ship at the commencement of the voyage and not afterwards. There was no warranty of a sufficient supply of coal for the whole voyage: *Dixon* v. *Sadler*. (1) But this is really a time policy; and in a time policy there is no implied warranty of seaworthiness: *Gibson* v. *Small* (2); *Dudgeon* v. *Pembroke*. (3) In Park on Marine Insurance, 8th ed. vol. i. p. 458, it is said: "Every ship insured must at the time of the insurance be able to perform the voyage, unless some external accident should happen." *The Vortigern* (4), on which the learned judge relied, related to a charterparty providing for a voyage from one specified port to another specified port, and it is only in such a case that the law recognizes a warranty of seaworthiness. There, any person looking at the charterparty and bill of lading would know the places at which the vessel would call; whereas here neither the underwriters nor the assured could tell at which ports this vessel had to call: the voyage is indeterminate, which makes the whole difference between the two cases. No further burden upon a shipowner ought to be implied. In *The Vortigern* (4) there was no question whether a warranty existed: the only question was whether the warranty had been satisfied, and the Court held that it had not.

Such a warranty as that the vessel, on leaving Monte Video, would be seaworthy in every respect, is not created by the contract, and is beyond what should be implied in law: *Hamlyn & Co.* v. *Wood & Co.* (5)

(1) (1839) 5 M. & W. 405, 414; 52 R. R. 774.
(2) (1853) 4 H. L. C. 353.
(3) (1877) 2 App. Cas. 284.
(4) [1899] P. 140.
(5) [1891] 2 Q. B. 488, 491.

In the present case the learned judge said that the negligence of the master was not the proximate cause of the loss; but negligence never is anything but a remote cause of a loss.

It is submitted that the plaintiffs are entitled to recover, as for a general average loss, both the defendants' proportion of the value of the ship's fittings and spars which were burnt, and also the plaintiffs' contribution as general average to the cargo owners for the portion of cargo burnt: *Strang, Steel & Co.* v. *A. Scott & Co.* (1); *Montgomery* v. *Indemnity Mutual Marine Assurance Co.* (2)

J. A. Hamilton, K.C., and *Simey*, for the defendants. This policy is a voyage policy for a voyage by stages, and there was an implied warranty of seaworthiness at the moment the ship sailed from each stage.

[VAUGHAN WILLIAMS L.J. The question is, Ought we, in this policy, to imply that warranty? Do you say that, in a fixed voyage from A. to B., the shipowner warrants that he will find coal on the way? The ship may be such that her bunkers will not be able to hold sufficient coal for the whole voyage.]

The shipowner ought to effect his insurance to a place which he can reach without exhausting his bunkers. There is no necessity for his sending his ship upon any part of a voyage without insurance. He should insure to a port where he can obtain fresh coal and so fulfil his warranty of seaworthiness. The warranty is that he will have on board a quantity of coal reasonably sufficient for the ordinary duration of the voyage.

In a question of seaworthiness between a steamship owner and his underwriter, the shipowner must prove he had sufficient coal for the whole voyage, or sufficient at the commencement of each stage—that the ship was seaworthy for the particular stage; if he fails in that, he fails in defeating the primâ facie inference of unseaworthiness: *The Vortigern.* (3)

[VAUGHAN WILLIAMS L.J. referred to the passage in the judgment of Gorell Barnes J. in that case, at the top of p. 147.]

(1) (1889) 14 App. Cas. 601. (2) [1902] 1 K. B. 734.
(3) [1899] P. 140, 155.

C. A. 1903

GREENOCK STEAMSHIP COMPANY v. MARITIME INSURANCE COMPANY.

This is not a case either of general average or of loss by negligence.

VAUGHAN WILLIAMS L.J. I think this case is really covered by the decision in *The Vortigern*. (1) Mr. Carver's argument was in reality an argument to shew that the policy here was, in effect, a time policy. He felt pressed by the words of the policy, which not only do not describe the risk to be taken as being a time risk, but so describe it as shewing obviously that the real risk was to continue from the time of leaving one of the optional ports, either in the United Kingdom or on the Continent, until the arrival back again of the ship at one of the optional ultimate ports. In stress of having to satisfy those words, he attempted to say that this was neither a time policy nor a voyage policy, and that therefore there was absolutely no warranty of seaworthiness by the shipowner at all. I do not myself think that it very much matters what this policy is called—whether a time policy or a voyage policy. One must look at the policy and see what was contemplated by the shipowner and the underwriters respectively, and whether, having regard to what both parties contemplated, the ship was seaworthy. Speaking for myself, I utterly reject the notion that under this policy it is possible to say that there was no warranty of seaworthiness at all. In fact Mr. Carver himself shrank from saying that there was no warranty of seaworthiness at the commencement of the voyage. Once assume that there was an original warranty of seaworthiness, then it seems to me that the principle of the decision in *The Vortigern* (1) absolutely covers this case. Looking at the judgments in *The Vortigern* (1), it seems to me that whether one regards the judgment of Gorell Barnes J. in the first instance, or the judgments in the Court of Appeal, the whole of the reasoning applies to the present case. For the purposes of my judgment I must assume that under the circumstances of this case there was a plainly implied warranty of seaworthiness at the commencement of the voyage. If that is so, it seems to me that the case is entirely covered by the

(1) [1899] P. 140.

judgments of Gorell Barnes J. and of the Court of Appeal. I called attention just now to the passage in the judgment of Gorell Barnes J. at the top of p. 147 of the report of *The Vortigern* (1), which seems to me to entirely accord with the following statement of A. L. Smith L.J. on p. 153: "To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships, for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present, by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination—it has become the practice, by reason of the necessity of the case, for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus, as far as practicable, complying with the warranty of seaworthiness which attached when the ship commenced her voyage." Looking at that passage, and also at the passage on p. 155 in the same judgment, it is clear that the holding is that the warranty of seaworthiness in the case of a long voyage is not broken because the steamer does not start in a seaworthy condition, but that the shipowner is entitled to satisfy the implied warranty by taking on board coal at the commencement of each stage of the voyage. It is plain that to hold that there is no such breach of warranty is a concession made by the law in favour of the shipowner rather than of the underwriters; and it is also plain that the way in which the Court regards these stages is to look at the voyage which is contemplated at each point at which the ship takes advantage of this liberty and stops to coal—that is to say, the shipowner must coal before the then contemplated voyage. That does not mean, however, in a case like the present, a voyage which is defined in terms upon the face of the policy; but it means that the shipowner, taking advantage of this method of satisfying the implied warranty, must make up his mind to what port he intends to proceed; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage.

(1) [1899] P. 140.

C. A. 1903

GREENOCK STEAMSHIP COMPANY v. MARITIME INSURANCE COMPANY.

Vaughan Williams L.J.

I only desire to add this observation. We have here a case which, having regard to the enormous extent of sea-carriage in the present day, must be arising every day. A voyage contemplated by a shipowner and underwriters such as we have here, including, as it does, undefined coasting voyages, must obviously be likely to give rise to occasions when the master of the ship is placed in great difficulty, not only in respect of the quantity and quality of the coal which he may be able to obtain, but also as to the time when he will be able to reach another coaling station. In such cases a very great stress must be thrown upon the master—even the most prudent master; and unless the shipowner was content that his ship should go to sea under such conditions as to render it by no means impossible that even with a fairly prudent master he, the shipowner, might find himself uninsured through the breach of warranty of seaworthiness—a warranty which ex hypothesi it is impossible to satisfy at the starting of the ship—one would have thought that, as between the contracting parties, the underwriters would have charged a sufficient premium in such a form that the shipowner's insurance should not be entirely dependent upon the judgment of the master in the decision of this difficult question as to the quantity and quality of coal which he might require. But for some reason or other the parties to these contracts of insurance seem to consider that the interests of commerce are forwarded by leaving things in a more or less uncertain state, so that the shipowner undertaking a voyage of this sort can never feel very confident that he is really covered by his insurance.

In my opinion the decision of the learned judge was right, and this appeal must, therefore, be dismissed.

ROMER L.J. I have come to the same conclusion. I think this case is covered in principle by the case of *The Vortigern* (1), by which this Court is bound. The form of the policy, on which the case before us turns, is one which to my mind shews that the policy is what is commonly called "a voyage policy"—a voyage policy properly so called. I may remark that the

(1) [1899] P. 140.

policy is so described by the parties on the face of it. It is for a voyage from any port or ports in the United Kingdom and the Continent between Bordeaux and Hamburg to any port or ports on the west coast of South America, and back again to corresponding ports. Undoubtedly this voyage is a curious one, because it may cover voyages between ports on the west coast of South America. If the case had been one simply for a voyage, say, from any port to be selected in a defined portion of Europe to a port to be selected in any defined portion of the west coast of South America and back again, nobody could for a moment have suggested that that was not a voyage policy in the strictest sense of the term to which the ordinary insurance law applicable to an implied warranty of seaworthiness would apply. The difference between that case and the present is really only one of degree. No doubt the voyage that is defined in this policy was a very onerous one for shipowners to undertake to insure against on one policy, but that was for them to consider. If the shipowners had wished to negative the implied warranty of seaworthiness on such a voyage to any extent, it was for them to do so by express bargain and by express stipulation in the policy. According to insurance law as applicable to the kind of question we have to decide on this appeal, there are only two kinds of insurance policy known—a time policy and a voyage policy. Speaking for myself, I think it would be most unfortunate for commercial law, and therefore for commercial people, if we had been obliged in this case to say that there was also a policy of a third kind known to the law—a kind of policy not hitherto supposed even by lawyers or by commercial men to exist. I do not of course mean to say but that one document might cover two policies—a voyage policy and a time policy; but in the present case the policy is not really two policies. The document does not cover two distinct insurances, and the policy is not in any true sense a time policy. It is, as I have pointed out, a voyage policy and nothing else; and I may point out, as has been frequently pointed out before, that the case of *The Vortigern* (1) was really decided in favour of the shipowners.

(1) [1899] P. 140.

C. A. 1903

GREENOCK STEAMSHIP COMPANY v. MARITIME INSURANCE COMPANY.

Romer L.J.

It was to free them in long voyages from what would otherwise have been a most onerous obligation on their part in the case of steamers—namely, that they would have been obliged, however long the voyage might be, to ship coal sufficient to last the whole of the voyage. In the present case, but for the principle of the *The Vortigern* (1), it would, notwithstanding the curious nature of the voyage, have been obligatory on the part of the shipowners to take care that when their vessel started from the port of departure it was reasonably coaled for the coming voyage.

With reference to an argument that was used before us in which it was said it was impossible for any shipowner to have coaled for such deviations of voyages on the west coast of South America as appear to have been contemplated by this policy, I need only say that this is not necessarily so. What the shipowner would have to do would be to coal to the extent that was reasonable, having regard to the probable nature and duration of the voyages likely to take place on the west coast.

As I have said, if shipowners choose to undertake voyages with steam vessels, and such a voyage as this, so described and so long, it is for them to protect themselves if they do not wish to incur the ordinary obligations that are cast upon them as shipowners in respect of such a voyage.

For the reasons I have given I think this appeal fails.

STIRLING L.J. I am of the same opinion. I entirely agree with what was said by Bigham J. in his judgment. He rested his decision, to a large extent, on the case of *The Vortigern*. (1) That is a decision of the Court of Appeal. It was binding on Bigham J., and it is no less binding upon us; and unless it can be effectually distinguished from the present case it seems to me to follow that Bigham J.'s decision must be affirmed.

Now, how is it sought to distinguish the two cases? In the first place, it is said that the case of *The Vortigern* (1) related to a contract of affreightment, whereas this relates to a contract of insurance. In *The Vortigern* (1) I observe that the learned counsel who argued for the appellant said in his

(1) [1899] P. 140.

reply that the doctrine of stages which was relied upon was a doctrine of insurance and ought not to be extended to a case of affreightment. Here, the argument is the other way —that this is a doctrine which relates to cases of affreightment alone, and ought not to be applied to cases of insurance. Now, it seems to me that both the Court of Appeal and Gorell Barnes J. rejected that argument, and treated the case as being the same whether it arises between the steamship owner and his underwriter on a voyage policy, or between the steamship owner and the cargo owner upon a contract of affreightment. I think, therefore, that the two cases cannot be distinguished on that ground.

But then it is said in the second place—and this is really the main contention—that the contract in the case of *The Vortigern* (1) related to a specified voyage, and that the contract in this case relates to a voyage of a different character. In *The Vortigern* (1) the voyage was, in substance, from Manila to Liverpool, with liberty to call at any ports in any order; and it was there held that the doctrine of stages applied. Now we have before us, undoubtedly, a case in which the voyage is described in much wider terms. It is from a port or ports in the United Kingdom, or within specified limits on the Continent, to a port or ports, or place or places, on the west coast of South America, and then back to a port in the United Kingdom, and between specified limits on the Continent, with power to go backwards and forwards, and forwards and backwards, on the west coast of South America. The risk is extended also until the expiry of thirty days after arrival, or until sailing on the next voyage, whichever first happens. Now Bigham J. held that in these circumstances the policy is what is termed, in the language of insurance, "a voyage policy," and it seems to me that it is. If the voyage had simply been described as one from a port in the United Kingdom to a port on the west coast of South America, and back from there to the United Kingdom, it would have been precisely within the decision in *The Vortigern* (1); and the power to go backwards and forwards on the west coast of

(1) [1899] P. 140.

C. A. 1903

GREENOCK STEAMSHIP COMPANY v. MARITIME INSURANCE COMPANY.

Stirling L.J.

South America does not seem to me to really affect the substance of the case.

It is possible that there are reasons which may be urged against the law as laid down in *The Vortigern* (1); but, if such there be, I express no opinion whatever upon them; they must be dealt with, if necessary, by a higher tribunal.

I think *The Vortigern* (1) cannot be distinguished for the purposes of the present case.

Appeal dismissed.

Solicitors: *Coote & Ball, for Adamson & Adamson, North Shields; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

G. I. F. C.

C. A. 1903 *Aug.* 1, 3, 4, 5.

[IN THE COURT OF APPEAL.]

ROWSON *v.* ATLANTIC TRANSPORT COMPANY, LIMITED.

Ship—Carriage by Sea—Bill of Lading—Cargo—Refrigerating Apparatus—Part of Ship—Negligence—Damage—Shipowner, Liability of—"Faults or Errors in Management of Vessel"—Harter Act (Act of Congress of U.S.A. 1893), *ss.* 1, 2, 3.

Butter was shipped on board the defendants' steamship at New York for carriage to London under bills of lading which incorporated the Act of Congress known as the "Harter Act," by s. 3 of which it is provided that, subject to the conditions therein named, the owner of the ship shall not be "held responsible for damage or loss resulting from faults or errors .... in the management of said vessel." The butter was carried in four out of six insulated chambers forming part of refrigerating apparatus bolted to the ship and connected with her engines, the other two chambers being used for the ship's provisions during the voyage. The butter was delivered in London in a damaged condition, resulting from the negligence of one of the ship's engineers in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high:—

Held, upon the facts, and especially as the refrigerating apparatus was used for the ship's provisions and not exclusively for the butter, that the apparatus must be regarded as being part of the ship, and that therefore the mismanagement of the apparatus was mismanagement of the ship, so that the neglect to keep the chambers sufficiently cooled

(1) [1899] P. 140.

during the voyage was a fault or error "in the management of said vessel" within the meaning of the bills of lading, and that the defendants were consequently excused.

Decision of Kennedy J., [1903] 1 K. B. 114, affirmed.

APPEAL from Kennedy J. (1)

Certain parcels of butter in tubs and boxes were shipped at New York on board the defendants' steamship *Minneapolis* under two bills of lading, both dated June 29, 1900, for carriage to London. By the bills of lading it was agreed that the shipment should be "subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th of February, 1893, and entitled 'An Act relating to Navigation of Vessels, &c.,'" commonly known as the Harter Act. (2)

(1) [1903] 1 K. B. 114.

(2) The Harter Act (52nd Congress, Sess. 2, c. 105), passed in 1893 for regulating the trade to and from United States ports, is set out in full in Carver on Carriage by Sea, 3rd ed. p. 123. It contains the following enactments:—

"1. That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

"3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel; nor shall

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

The butter, which was sound when shipped at New York, was delivered in London to the plaintiff, the indorsee of the bills of lading, in a damaged condition. It was carried in certain insulated chambers forming part of the refrigerating machinery or apparatus with which the ship was supplied for the purpose of enabling her to carry perishable goods during the summer months. At the time of the shipments these chambers were cooled down to a proper temperature for the reception of the butter: the refrigerating apparatus was then in good working order, and it was kept so during the earlier part of the voyage. The insulated refrigerating chambers were six in number and lettered A to F, and were secured to the ship by bolts. Connected with the refrigerating chambers was a pipe communicating with the ship's engines, and through which oil was driven by steam from the boiler into the gland of the piston-rod of the compressor forming part of the refrigerating apparatus.

Kennedy J. in his judgment thus described the material portion of the refrigerating apparatus, though this passage of his judgment is not given in the report below: "One part of this machine is a compressor, in which carbonic acid gas is put under very great pressure by means of a piston. In order that that work may be done effectively it is necessary that the carbonic acid gas should not escape. One place by which it would very naturally escape, unless special precautions were taken, is the gland in which the piston-rod works; and to prevent escape there the gland has to be very securely packed. It is packed and made tight by means of leather rings, and that arrangement is supplemented by driving into the gland lubricating oil, which acts both as a lubricant and also as a kind of additional cushion, and makes the gland work perfectly tight, so that the gas cannot escape at all."

---

the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such serv

It appeared from the evidence that, on the voyage in question, four of the six chambers, namely, A, B, C, and D, were used solely for the cargo of butter, and the remaining two, E and F, for the storage and preservation of the ship's provisions during the voyage. One of the engineers of the ship who was ordered, as part of his duty, to attend to the proper working of the pipe through which the oil was driven into the piston-rod gland, shut off the valve in the pipe, in order to save himself trouble, as he in fact admitted in evidence, the result of which was that the flow of oil was arrested and the carbonic acid gas escaped, thus causing the temperature in the refrigerator to be very much raised, with consequent damage to the butter.

The plaintiff claimed 250*l.* damages for alleged breach of contract by the defendants.

The question was whether this negligence in the management of the refrigerating apparatus was a "fault or error in the management of the vessel" within s. 3 of the Harter Act, so as to excuse the defendants, the shipowners, from liability. Kennedy J., at the trial of the action without a jury, held that it was, and that the defendants were therefore excused.

The plaintiff appealed.

J. A. Hamilton, K.C., *Loehnis*, and *Ricardo*, for the plaintiff. In order to understand the application of the Harter Act to this case, the Act must be read as if it had been set out at length in the bills of lading: *Dobell & Co.* v. *Steamship Rossmore Co.* (1); and s. 3, upon which the present question mainly turns, must be construed by the light of ss. 1 and 2. Now ss. 1 and 2 expressly prohibit anything being introduced into a bill of lading which will relieve the shipowner of his liability to properly stow and care for a cargo; and therefore s. 3 must not be regarded as diminishing that liability. The effect of Kennedy J.'s conclusion that the mismanagement of the refrigerating apparatus was mismanagement of the vessel within s. 3 is to neutralize the absolute prohibitions of the preceding sections.

Then it is necessary to consider what is the meaning of the

(1) [1895] 2 Q. B. 408.

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

word "seaworthy" in ss. 2 and 3. "Seaworthy" means, in its primary sense, that the ship is fit to perform the intended voyage—that she is watertight and staunch. But the word has a more extended meaning than that. In every contract of carriage the shipowner impliedly contracts that his ship, on sailing, is fit, not only to encounter the perils of the sea, but to carry the cargo, having regard to the particular character of that cargo. That the ship is fit to carry the particular cargo is an obligation lying upon the shipowner, and is a condition precedent to the loading of the cargo by the shipper and to the sailing of the ship: *Stanton* v. *Richardson* (1); *Rathbone* v. *McIver*. (2) And when the shipowner has undertaken to take care of the cargo by using for that purpose a particular apparatus, such as refrigerating machinery, he has been held to be under a further warranty that his apparatus shall be fit for its purpose: *Owners of Cargo on Ship Maori King* v. *Hughes* (3); from which case it appears that the obligation on the shipowner to provide a ship fit, at the time of shipment, for carrying the cargo, is really an obligation distinct from that of seaworthiness. His obligation is to carry safely, and notwithstanding any exemption in the bill of lading he is bound to exercise due care and not to be negligent.

General exemption clauses in a contract for carriage, whether by sea or land, are only intended to protect the carrier if he exercises proper care: *Steinman & Co.* v. *Angier Line, Limited* (4); *Burton* v. *English*. (5) At any rate, the bills of lading in this case are so ambiguous that they ought not to be construed as meaning what Kennedy J. says they mean. If negligence on the part of the shipowners is proved in this case there can be no doubt of their liability under the Harter Act: *Calderon* v. *Atlas Steamship Co.* (6)

Then was this damage caused by "any fault or error in the management of the vessel" within s. 3 of the Act, so as to excuse the defendants? It is submitted that it was not. The

(1) (1872) L. R. 7 C. P. 421, 425, 434, 436.
(2) (1903) 19 Times L. R. 590.
(3) [1895] 2 Q. B. 550, 555–6, 558.
(4) [1891] 1 Q. B. 619, 623.
(5) (1883) 12 Q. B. D. 218, 224.
(6) (1898) 170 U. S. 272.

words "management of the vessel" do not include improper stowage or care of cargo, and therefore the shipowner is not protected by the clause of exemption from liability for damage to the cargo through neglect in the management of the vessel: *The Ferro* (1); *The Glenochil* (2); *The Accomac.* (3) The construction put upon the language of s. 3 by Gorell Barnes J. in *The Rodney* (4) is inconsistent with the previous decisions. Measures taken by the crew for the storing of or duly attending to the cargo are not in fact for the "management" of the ship, but for the custody of the cargo: *The Prussia.* (5) Everything that is done for the care and custody of the cargo must be regarded as distinct from the management of the ship. Attending to refrigerating machinery cannot be said to be included in the management of the ship merely because it happens to be bolted to the ship and is operated by the ship's engines. It may be that on a particular voyage the machinery may not be required to be used at all. It is essentially an arrangement for the care and custody of the cargo, and the shipowner can only escape liability for his negligent default as regards such care and custody by clear, definite, and express language: mere words of general exemption are insufficient to protect him. Here the successful carriage of these goods depended upon the refrigerating machinery being kept in good working order. The learned judge has found as a fact that the goods were damaged through the negligence of the crew in not keeping the refrigerator at a sufficiently low temperature; and the plaintiff relies upon that finding of fact as establishing the defendants' liability.

Robson, K.C., and *D. Stephens*, for the defendants. As to the construction of the Harter Act, ss. 1 and 2 are quite independent of s. 3; they absolutely prohibit contracts being entered into between private persons as to their liabilities in relation to the subject-matters there mentioned. Then the Legislature says: "We will make the contract for you; we will modify your common law rights." Accordingly, s. 3 is

(1) [1893] P. 38, 44.
(2) [1896] P. 10, 14–6, 18.
(3) (1890) 15 P. D. 208.
(4) [1900] P. 112, 117.
(5) (1898) 88 Fed. Rep. 531, 533; (1899) 93 Fed. Rep. 837, 840.

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

intended to be in substitution for the various kinds of contracts prohibited by ss. 1 and 2; it is a clause in substitution for the existing state of the law. The section does not merely create an exemption in favour of the shipper, but it is a declaration in favour of both shipper and shipowner. The question here then turns on the meaning of one phrase, "the management of said vessel." Was the act or neglect complained of a fault or error in the management of the vessel? In order to construe the phrase, Kennedy J. referred to the cases on "seaworthiness," and he says that, with regard to cargo, "seaworthiness" is that quality of a ship which fits it for carrying safely the particular merchandise it takes on board. "Seaworthiness" is something more than a condition sufficient for keeping the ship afloat: it means also the fitness of the ship for carrying the cargo, as in the bullion case: *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (1)

The first point to consider is, What is a "ship"? A ship is not merely something that can be propelled through the water: it includes everything that can be included in a ship constructed for carrying a cargo. The shipowner is bound to put before the shipper a ship which can safely carry the cargo, and which consequently includes everything that is necessary to the safety of the cargo to be carried; and it is submitted that in the present case the refrigerating machinery is a part of the ship necessary for carrying this cargo; and so Kennedy J. has properly held, on the authority of the *Maori King Case.* (2) "Vessel" in the Act means "vessel with reference to the particular cargo carried"; it must be defined by reference to safe carriage: *Steel* v. *State Line Steamship Co.* (3) Safe carriage is the primary object; propulsion is secondary. Here, this refrigerating machinery, whether fixed or loose, is part of the necessary instrument of carriage.

The strongest case in favour of the defendants is *The Rodney* (4), where, upon s. 3 of the Act, it was held that "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the

(1) [1898] 1 Q. B. 567.
(2) [1895] 2 Q. B. 550.
(3) (1877) 3 App. Cas. 72, 77.
(4) [1900] P. 112, 117.

cargo. Thus, where by some neglect or oversight on board damage is caused to the cargo, that is a "fault or error in the management of the vessel" against which the shipowner is protected by s. 3: *The Mexican Prince* (1); *The Strathdon*. (2) The defendants therefore contend that this refrigerating machinery is part of the ship, as a ship, necessary for carrying this particular cargo, and that the mismanagement of that machinery is mismanagement of the ship, and so covered by s. 3.

J. A. Hamilton, K.C., in reply.

VAUGHAN WILLIAMS L.J. This case seems to me to be rather on the border-line; but the question we have to decide is really one of fact, and not one of the construction of the sections that have been imported into these bills of lading from the Harter Act. Now, the decision, as I understand it, of Kennedy J. comes to this: he finds that the vessel, at the moment of starting on this voyage carrying this butter, was, in all respects, seaworthy and properly manned, equipped, and supplied; and having come to that conclusion, he comes to another conclusion in fact—namely, that the damage which admittedly occurred in respect of this butter by reason of its not being kept cool in the refrigerating chambers was a damage which arose in the management of the vessel. I do not think that any one dealing with these sections imported from the Harter Act would deny that, if those two conclusions in fact of Kennedy J. are right, his ultimate judgment is right. If it is really true that at the moment of commencing the voyage the ship was seaworthy and properly equipped and supplied, and if it is also true that the damage which has occurred to this butter is damage resulting from the management of the vessel, the conclusion would seem to be irresistible that the shipowner is relieved from liability in respect of this matter.

Now, one has to consider first what are the facts in this case, and see whether the evidence is such, and the facts which are admitted are such, as to justify the conclusion of Kennedy J.; but before doing so I propose to make a few observations upon these sections which have been imported.

(1) (1897) 82 Fed. Rep. 484, 489. (2) (1898) 89 Fed. Rep. 374.

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

Vaughan Williams L.J.

Sect. 1 forbids the shipowner introducing into the bill of lading any clauses which shall relieve him from liability for the improper care of cargo. Sect. 2 is rather more complicated, and is as follows: [The Lord Justice read it, and continued:—]

Thus this section prohibits the shipowner relieving himself in any way, first, from the obligation of seaworthiness, and, secondly, from the obligation of taking proper care of the cargo. Now we have not to apply either of those two sections to the present case, for the question before us is not whether there are clauses in these bills of lading which are prohibited by the words of those sections. Mr. Hamilton and Mr. Robson take a different view of the three first sections of the Act as a whole. Mr. Hamilton says you must construe s. 3 in the light of ss. 1 and 2, and that when you find in ss. 1 and 2 the prohibition against introducing into a bill of lading or other shipping document anything which shall relieve the shipowner of his liability to properly and carefully handle and stow a cargo, and to care for and properly deliver the same, or by which such obligations shall in any wise be lessened, weakened or avoided, it is quite plain that you must not attribute to the words, "in navigation or in the management of said vessel," which occur in s. 3, any meaning which will neutralize or take away the effect of the provisions in ss. 1 and 2; and he says that the effect of coming to Kennedy J.'s conclusion, that the mismanagement of this refrigerating machine was mismanagement of the vessel, is to neutralize and reduce to nothing the provisions of ss. 1 and 2. Mr. Robson, on the other hand, says that ss. 1 and 2 constitute merely two independent prohibitions—that these are things the shipowner shall not do. Then he says that s. 3 means this: "Instead of allowing you, the shipowner, and you, the shipper, to determine what your respective positions are, we, by s. 3, define what those obligations shall be for the future." That, he says, is the proper way of construing s. 3, and that you have no right to read it as connected with ss. 1 and 2. There is a good deal to be said for both views; but the conclusion I have come to myself is that neither view is quite right: that the one makes the dependence stronger than it really is, and the other assumes more inde-

pendence than we ought really to find in these sections. Taking that view, when I come myself to read these words, I so far agree with Mr. Hamilton that I think that "in the management of said vessel" means in the management of the vessel quâ vessel. I do not think that "the management of said vessel" is at all the same thing as "in navigation." What one has to ask one's self is, in my judgment, this: What, for the purpose of s. 3, is the meaning of the words "in the management of said vessel"? I say they mean "in the management of the said vessel quâ vessel."

Now, under those circumstances, if in this case we found that in the refrigerating chambers containing the butter some appliance had been placed simply for the purpose of refrigerating the butter, I should have hesitated very much to say that the refrigerating apparatus was part of the vessel, and I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special apparatus was a mismanagement of the vessel; but it is not the fact here that this refrigerating machine was introduced into this ship with special reference to this butter. It was, to my mind, no more introduced into this ship with reference to this butter than the portholes, or the removability of the hatches for the purpose of ventilation, or any other ventilating apparatus, could be said to be introduced for the purpose of a particular cargo. I think that, on the evidence, this refrigerating machine was put into the ship for the purpose of cooling the ship. It is quite true that, when the refrigerating machine was once there, it could be applied either to cooling the butter, which in this case happened to be in chambers A, B, C, and D, or to cooling the ship's provisions, which happened to be in chambers E and F, constituting the ship's store-room in which the provisions for consumption on the voyage were kept. The machine could be used for any of those purposes; but, in my judgment, we ought not, sitting as a Court of Appeal, to say that Kennedy J. was wrong in holding, as he seems to me by his judgment to have held, that this particular refrigerating apparatus was part of the ship, and that the management of it was management of the vessel

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

Vaughan Williams L.J.

and, therefore, that the mismanagement of it was the mismanagement of the vessel. That is the conclusion at which I have myself arrived in this case. Though it is not necessary for me to construe ss. 1 and 2, yet I do construe them to this extent: it is the contrast between the dealing with the stowage of the cargo, and the dealing with the vessel itself, that leads me to say, when I come to s. 3, that "management of the vessel" means management of the vessel quâ ship—not quâ navigation, but quâ ship. The moment I arrive at the conclusion that I cannot say Kennedy J. was wrong in finding as he did, in effect, find, that this refrigerating machine was a part of the vessel, it seems to me that all the rest of his conclusion follows. I think myself it was part of the vessel, and I think that the damage to this butter resulted from negligence in the management of this part of the vessel, and, therefore, of this vessel.

ROMER L.J. I have come to the same conclusion. Under the first two sections of the Harter Act, it is clear that the common law liability of the shipowner regarding the necessity for due care being taken in respect of the cargo was carefully reserved, except so far as that liability may have been expressly cut down by the provisions of s. 3. Looking at s. 3, I think it is reasonably clear that the section was directly aiming at negligence of the owners, agents or charterers of the ship in respect of the navigation or the management of the vessel properly so called. The shipowners are free from negligence in the management of the vessel, regarded as, as has been said, a vessel; but I also agree that, in considering what is a vessel, one must bear in mind that it is to be regarded as a cargo-bearing carrier, and, moreover, it may be regarded specially by consideration of the particular cargo carried during the voyage. Cases of difficulty may, as in the present case, often arise as to whether the negligence which has resulted in an injury to cargo is to be regarded as negligence in the care of the cargo within the earlier sections of the Act, or negligence in the management of the vessel under s. 3. I think it is difficult, if not practically impossible, to attempt successfully to lay down

any general principles as to how any particular case should be dealt with. I think one must look at the facts of each case as it arises, and on those facts determine upon which side of the line the case falls. In considering those special facts, I think the following that I am about to mention are, or may be, worthy of consideration in determining the question; for example: What was the act of negligence complained of? By whom was it committed? In particular, was the man who was guilty of the negligence acting at the time as an ordinary member of the officers, engineers, or crew of the ship? Was he, or not, acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely, or in particular, in looking after the cargo and for the purposes of the cargo? Further, in some cases it may be important to consider whether the injury to the cargo was caused directly or indirectly by the act of negligence. I do not, as I have said, attempt to lay down any general principle; I only say that, in considering the circumstances in each case, attention may well be directed to the kind of considerations I have indicated, so far as they are applicable.

In the present case the facts which prevent me from differing from the learned judge in the Court below in his conclusion of facts are these. It appears that, as part of the vessel, there were several refrigerating chambers, and there was in particular a pipe, the operation of which when properly worked was to keep the air of the refrigerating chambers sufficiently cool. Now those chambers were not all used for the cargo of butter, for during the particular voyage we are now considering two of them were being used for the ordinary purposes of the ship in this sense, that they were used for the storage of provisions which required refrigerating, those provisions being required for the ordinary purposes of the ship's crew, or of the passengers, if there were any, during the course of the ship's voyage as a sea-going carrier. The man who had to attend to this pipe was an engineer of the ship employed in the ordinary way in looking after this pipe regarded as part of the vessel. He had not been specially told, nor was it his special duty, to look after the cargo in

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

ROMER L.J.

particular or any part of the cargo. The pipe he had to attend to was wanted, as I have pointed out, for the general purposes of the ship as well as for the requirements of some of the cargo, but, so far as the engineer attending to it was concerned, all he had to do was to look upon it as it was, namely, as a pipe required for the general purposes of the vessel. He had not to consider it as affecting any special or particular part of the cargo; indeed, I may point out that this engineer would have had to attend to this pipe, as it appears from the facts of the case, even if there had been no cargo requiring refrigerating, for he would have had to keep the pipe at work for the purpose of keeping cool the two chambers which contained the ship's provisions; and the injury to the cargo which was caused by the act of negligence was only indirectly caused by the act. The effect of his act was to prevent the pipe acting properly so as to cool the refrigerating chambers as a whole, and the effect of that upon some of the refrigerating chambers was that the temperature got above the proper temperature necessary for proper preservation, and part of the cargo became injured. But, as I have said, it really was, properly regarded, only an indirect injury to the cargo; so far as the pipe itself was concerned, the pipe was intact; the mismanagement of the pipe was a mismanagement of it in working the pipe quâ pipe, as I have said, and as part of the vessel. When I look at all these facts of the case, the conclusion I have come to is that this engineer was guilty of an act of negligence in the management of the ship regarded as a vessel, and even regarded as a vessel carrying cargo. In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation in sect. 3 of the Act.

STIRLING L.J. I have come to the same conclusion, though I think this is a case of very considerable difficulty. We have

to deal with a bill of lading which stipulates that the shipment is to be subject to all the terms and provisions of and all the exemptions from liability contained in the Harter Act. We have been invited by counsel on both sides to deal with this case on the same footing as if those terms, provisions, and exemptions had been set out verbatim in the bill of lading. Whether that is the true construction it is unnecessary to say. The course we are asked to adopt has been sanctioned by the Court of Appeal in former cases, and particularly in that of *Dobell & Co.* v. *Steamship Rossmore Co.* (1), and we are therefore at liberty to take that course on this occasion. The general frame of the Harter Act is this: the 1st section forbids the introduction into any bill of lading or other shipping document of any clause relieving the shipowner from liability in respect of negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of the cargo. The 2nd section, first of all, prohibits the shipowner from introducing into any bill of lading or shipping document anything which exonerates him from his obligation to exercise due diligence in properly equipping and outfitting the vessel and making the vessel seaworthy and capable of performing her voyage. It also, secondly, prohibits the shipowner from introducing any clause which exempts him from liability in respect of the "obligations of the master, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver same." Then the 3rd section provides as follows: [The Lord Justice read the first clause of the section, and continued:—]

The question we have to deal with here is whether a fault or error has been committed in the management of the vessel within the meaning of that 3rd section. This question has been considered both by the Courts of this country and by the Courts of the United States. I say nothing as to the decisions of the United States Courts, because we are not, on the present occasion, dealing with American law; but I understand them to have gone on the same lines as the cases which have been decided in this country, namely, the two cases in the Probate

(1) [1895] 2 Q. B. 408.

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

Stirling L.J.

Division of *The Glenochil* (1) and *The Rodney*. (2) I agree with the general view that has been taken of the sections in those two cases, namely, that there is a distinction drawn in the Act between the dealing with the cargo and the management of the vessel. I accept the view which is taken by the President of the Probate Division in *The Glenochil* (1), where it is said that the object of s. 1 is "to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo." Then the President proceeds: "It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary, sense, any mismanagement of the ship, in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by s. 3 to exempt from liability for damage or loss resulting from faults and errors of navigation or in the management of the vessel; and the way in which those two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo." And Gorell Barnes J., who also took part in the decision, says this: "If those sections (the sections of the Harter Act) are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'"

In the subsequent case of *The Rodney* (2) the same lines are adhered to, but the learned judges both say that in that case the learned county court judge had limited their meaning in

(1) [1896] P. 10. (2) [1900] P. 112.

The Glenochil (1) too narrowly; and the President said: "The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil*." (1) And Gorell Barnes J. says: "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo."

Kennedy J., in his judgment, describes the refrigerating apparatus as follows: [The Lord Justice then read the passage above quoted from the judgment, and continued:—]

Now, what happened here was that, for the purpose of saving trouble, the engineer in charge more particularly of this portion of the apparatus saw fit to turn a handle by means of which the passage of the oil into the gland was stopped. The result was that the temperature was very much raised in the refrigerator and the butter was damaged. The learned judge found that the damage was done by the engineer in negligently working the refrigerating apparatus in the vessel. The question is whether this is a fault or error committed, within the language of the Act, in the management of the vessel, or is it a fault or error committed in taking care of the cargo which it is the duty of the shipowner to see to. That ultimately comes down to a question of fact, the general meaning of the sections of the Act having been ascertained in the way I have pointed out. It raises questions which are not by any means easy to decide in many cases, but I will give an example or two to illustrate how the case can be put.

Suppose, for example, by negligence, if you will, but by some fault or error committed in the engine-room, a rod which worked the piston of the refrigerating apparatus was broken and it was impossible afterwards to set the refrigerating apparatus in motion: on which side of the line would that lie? It seems to me that that would be a fault or error committed in the management of the ship. On the other

(1) [1896] P. 10.

C. A. 1903

ROWSON v. ATLANTIC TRANSPORT COMPANY.

Stirling L.J.

hand, if the refrigerating chambers or refrigerating machines were entirely devoted to cargo, and the neglect had been, as it was in the present case, the act of turning a handle which intercepted the supply of oil to this particular spot in the machine, I should have felt very great hesitation in saying that was not neglect in taking proper care of the cargo; and for a long while I was under the impression that that really represented the state of things here, and that the negligent act had nothing to do really with the general management of the vessel, but simply with the management of a portion of the vessel which was exclusively appropriated to the cargo. But it now turns out that the refrigerating portion of the vessel does include chambers which are applied and used for carrying provisions for the ship, and these are worked with precisely one and the same apparatus as the chambers which are devoted to the preservation of the cargo. The duties of the particular engineer in charge were not limited, as I understand, to taking care of the cargo, or indeed to this particular portion of the refrigerators; and although I think the case very near the line, it does seem to me that I ought to come to the conclusion that the fault or error was committed in the management of the vessel within the meaning of s. 3 of the Harter Act.

I therefore agree with my learned brethren that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Waltons, Johnson, Bubb & Whatton; Holman, Birdwood & Co.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1903
Aug. 6.

HERNE BAY STEAM BOAT COMPANY *v.* HUTTON.

Ship—Naval Review—Contract of Hiring—Specific Performance—Failure of Consideration—Liability of Hirer—Demise of Ship.

In consequence of the public announcement of an intended Royal naval review at Spithead on June 28, 1902, an agreement in writing was entered into between the plaintiffs and the defendant that the plaintiffs' steamship *Cynthia* should be "at the disposal" of the defendant on June 28 to take passengers from Herne Bay "for the purpose of viewing the naval review and for a day's cruise round the fleet; also on June 29 for similar purposes: price 250*l.* payable, 50*l.* down, balance before ship leaves Herne Bay."

On the signing of the agreement the defendant paid the 50*l.* deposit. On June 25 the review was officially cancelled, whereupon the plaintiffs wired to the defendant for instructions, stating that the ship was ready to start, and also requesting payment of the balance. Receiving no reply, the plaintiffs, on June 28 and 29, used the ship for their own purposes, thereby making a profit. On June 29 the defendant repudiated the contract in toto. During the two days in question the fleet remained anchored at Spithead.

In an action by the plaintiffs to recover the balance less the profits made by their use of the ship during the two days:—

Held, reversing the judgment of Grantham J., that the plaintiffs were entitled to recover, because (1.) the venture was the defendant's, the risk being his alone; and (2.) the happening of the naval review was not the sole basis of the contract, so that there had been no total failure of consideration, nor a total destruction of the subject-matter of the contract:

Held, further, that the contract did not operate as a demise of the ship.

THE plaintiffs were owners of a steamboat called the *Cynthia*, which they usually employed for the daily conveyance of passengers between Herne Bay and Gravesend and other places on the Thames.

The defendant being desirous of chartering the steamboat for June 28 and 29, 1902, for the purpose of taking paying passengers to see the royal naval Review at Spithead—which it had been publicly announced would be held on June 28—and also for trips round the fleet, entered into negotiations for that purpose with the plaintiff company through Mr. Henry C.

C. A. 1903

HERNE BAY STEAM BOAT COMPANY v. HUTTON.

Jones, a director and the secretary of the company. Ultimately, on May 23, 1902, the following agreement, signed by both parties, was entered into between the defendant and Jones: "The *Cynthia* to be at Mr. Hutton's disposal at an approved pier or berth at Southampton on the morning of June 28, perils of the sea, &c., permitting, to take out a party, not exceeding the number for which the vessel is licensed, to the position assigned by the Admiralty, for the purpose of viewing the naval review and for a day's cruise round the fleet; also on Sunday, June 29th, for similar purposes. Owners to provide crew, coals, and all necessary assistance. Mr. Hutton to pay all tolls, pier dues, &c. Owners to have the right of ten persons above crew, &c., on board. Price 250*l.* payable, 50*l.* down, balance before ship leaves Herne Bay." It was also agreed that the plaintiffs should cater for the passengers during the two days at so much a head. Upon the signing of the agreement the defendant paid Jones the 50*l.* deposit. Considerable correspondence then passed between the parties as to the position to be assigned to the ship at the review, the places for taking up and landing passengers on the two days, the catering arrangements, the fares for passengers, and other matters: the plaintiffs, moreover, assisted the defendant in the disposal of tickets and in posting notices of the intended trips. Ultimately, on June 23, Mr. Jones wrote to the defendant requesting payment of the balance of 200*l.*, and also asking for a definite statement as to the number of people to be catered for, but received no reply.

On June 25, 1902, the official announcement cancelling the review was published, whereupon, the ship being then at Herne Bay, Jones wired to the defendant's address, "What about *Cynthia*? She ready to start six to-morrow. Waiting cash," but received no answer, and accordingly the plaintiffs decided that the ship should resume her ordinary sailings between Herne Bay and places on the Thames, which she did, and the plaintiffs made profits thereby on June 28 and 29.

On June 29 the defendant called on Jones and stated that, as the review had been cancelled, he did not require the use of the

ship, and he therefore declined to pay the balance of 200*l.* or to have anything more to do with the agreement.

On the two days in question, although the review was cancelled, the fleet remained anchored at Spithead.

On July 7, 1902, the plaintiffs issued the writ in this action claiming the balance of 200*l.* under the agreement. In their statement of claim they alleged that they had carried out their part of the agreement by having made all arrangements for the ship to leave Herne Bay suitably equipped, and were always ready and willing to fully perform the agreement.

In his defence the defendant insisted that although the plaintiffs were not prevented by perils of the sea, or otherwise, the ship was not put at his disposal at Southampton, or at all, on June 28 or 29, or at any other time; that, on the contrary, the plaintiffs were running her on trips in the Thames for their own purposes on each of those days, and on each day between June 22 and July 2, inclusive. The defendant further alleged that it was a condition of the agreement, either expressed or implied, that the naval review should take place on June 28; and that the consideration for the agreement wholly failed. The defendant counter-claimed for the return of the deposit of 50*l.*

In their reply and defence to the counter-claim, the plaintiffs asserted that they provided a crew, obtained coals, and prepared the ship for the use of the defendant, but that according to the terms of the agreement she was not to leave Herne Bay until payment of the balance of the agreed price; and that they did not run the ship until after the defendant had neglected to pay the balance. As to the counter-claim, they denied that the consideration failed, and insisted that the 50*l.* was paid down on account of the agreed price of 250*l.*

It appeared that the plaintiffs made a profit of 90*l.* on their running of the ship during the two days in question, so that at the trial they reduced the amount of their claim to 110*l.*

The action was tried on February 10, 1903, before Grantham J., without a jury, when judgment was given for the defendant on the claim, with costs, and for the plaintiffs

C. A. 1903

HERNE BAY STEAM BOAT COMPANY v. HUTTON.

on the counter-claim, with costs, but execution was stayed to enable the plaintiffs to appeal.

The plaintiffs appealed from so much of the judgment as refused their claim.

The appeal was heard on August 6, 1903.

Montague Lush, *K.C.*, and *A. S. Poyser*, for the plaintiffs. It cannot be said that this contract was altogether impossible of performance, and therefore not binding upon either party, for one of its purposes was to cruise round the fleet, which was quite possible. Secondly, this was simply a contract under which a steamer belonging to the plaintiffs was chartered to the defendant for certain purposes of his own, and at his own risk, the purposes for which she was required being no concern whatever of the plaintiffs; and by that contract we submit he was bound. The contract really operated as a demise of the ship. Again, the payment of the money did not depend upon the happening of the contemplated event at all, for it was to be paid before the ship left Herne Bay. The defendant cannot be permitted to import into the contract a stipulation that, if he did not see all he wanted to see, he was not to pay. It is well settled that, where there is a positive contract to do a thing, the contractor must perform it or pay damages, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible; and that the contract is not subject to any condition either express or implied: *Taylor* v. *Caldwell*. (1) The motive for the contract must not be mixed with the consideration; the one has nothing to do with the other: *Besant* v. *Wood*. (2) Therefore failure of the motive does not make the consideration fail. There is no principle upon which the plaintiffs should be treated as if they had never made a contract.

E. W. Hansell, and *F. L. Firminger*, for the defendant. This contract did not amount to a demise of the ship: it was a mere licence to the defendant to fill the ship with his own nominees—a licence for the occupation of a ship for a limited purpose, like a licence to occupy a seat for a certain purpose.

(1) (1863) 3 B. & S. 826. (2) (1879) 12 Ch. D. 605, 617.

The true effect and meaning of the contract and the sole object of it was that the ship should be a review-visiting ship; but as the object of the contract became impossible, so that the ship never did in fact exist as a review-visiting ship, the contract was really one impossible of performance: *Nickoll* v. *Ashton*. (1) The principle of *Taylor* v. *Caldwell* (2)—that where the existence of a particular person, or thing, or state of things, can be regarded as the very foundation of the transaction, it may be implied that if the foundation fails, the transaction based on it ceases to be effectual—applies equally to the non-happening of a particular event. In short, the eventual non-existence of the subject-matter of a contract excuses the parties from performance: *Hobson* v. *Pattenden*. (3)

[VAUGHAN WILLIAMS L.J. In *Jackson* v. *Union Marine Insurance Co.* (4) the rule in *Taylor* v. *Caldwell* (2) was held to apply although there was no certum corpus.]

The rule in *Taylor* v. *Caldwell* (2) is not limited to a case in which the certum corpus has been destroyed: it has been extended to a case where the certum corpus is not capable of being used; and it has been further extended to a case in which the event specified in the contract does not happen. This contract should be regarded as having been made conditional upon the happening of the particular event, just as much as upon the continuation at a future date of a thing at present existing. The review was abandoned before there was any breach of contract, and that excused both parties.

As to the contract operating as a demise of the ship, it has been held that a charter is not a demise: Scrutton on Charter-parties and Bills of Lading, p. 6, citing *Dean* v. *Hogg* (5) and *Lucas* v. *Nockells*. (6)

This was merely a conditional licence to the defendant to put a certain number of people on board this steamer. Moreover, this is not an ordinary case of hiring a ship for one person's own purposes, for the contract stipulated that ten

(1) [1901] 2 K. B. 126, 133.
(2) 3 B. & S. 826.
(3) (1903) 88 L. T. 90; 19 Times L. R. 186.
(4) (1874) L. R. 10 C. P. 125.
(5) (1834) 10 Bing. 345; 38 R. R 443.
(6) (1828) 4 Bing. 729; 29 R. R. 721.

C. A. 1903

HERNE BAY STEAM BOAT COMPANY v. HUTTON.

nominees of the plaintiffs should be taken on board: so that it was in reality a joint speculation, and in point of fact the plaintiffs were themselves instrumental in selling tickets and in issuing notices of the intended trips. Again, the plaintiffs have themselves virtually repudiated the contract, for they chose to use the ship for their own purposes on the days in question. (1)

VAUGHAN WILLIAMS L.J. In my opinion this appeal must be allowed.

I wish first to call attention to this, that what the plaintiffs originally claimed in this action was the sum of 200*l.*, being the balance of the price of 250*l.* which was agreed to be paid. That actual sum, in my judgment, the plaintiffs are not entitled to recover: I do not think Mr. Lush could have borne in mind that that was the original claim, and, therefore, he regarded some of the observations of Grantham J., dealing with the original claim, as if they were applicable to the subsequent claim. In my judgment there was, in this case, before the time came for the performance of the contract, a plain repudiation by the defendant of his obligations under it; and this is in fact admitted. He refused to carry out the contract on his part, and the plaintiffs, acting very properly in the circumstances, employed the steamer on her usual daily services, and made what profit they could out of her during the two days they intended by the contract that the defendant should have the use of the vessel. Under these circumstances the plaintiffs' claim is really for damages for the defendant's refusal to carry out the contract, and it is agreed that these damages are not 200*l.*, but that sum less the profit made by the plaintiffs from having the use of the ship after the repudiation of the contract by the defendant. These damages, I think, the plaintiffs are entitled to recover. In my opinion, this contract really placed the vessel at the disposal of the defendant for these particular days. The contract, which was signed by Mr. Jones, acting for the owners of the ship, runs thus: [The Lord Justice read it, and continued:—] According to my understanding of this con-

(1) See *Elliott* v. *Crutchley*, ante, p. 476, and *Krell* v. *Henry*, post, p. 740.

tract, this ship was placed at the disposal of Mr. Hutton really for those two days. Mr. Hansell says this does not constitute a demise of the ship, and with that I agree. It is very rarely that a charterparty does contain a demise of a ship. Generally speaking, the ship is not demised at all, but remains under the management and control of her owner. But at the same time this contract does, in my opinion, place the ship at the disposal of Mr. Hutton, just as a charterparty places the vessel, the subject of it, at the disposal of the charterers.

That being so, what is there besides in the present case? Only this, that Mr. Hutton, in hiring this vessel, had two objects in view: first, of taking people to see the naval review, and, secondly, of taking them round the fleet. Those, no doubt, were the purposes of Mr. Hutton, but it does not seem to me that because, as it is said, those purposes became impossible, it would be a very legitimate inference that the happening of the naval review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of *Taylor* v. *Caldwell.* (1) On the contrary, when the contract is properly regarded, I think the purpose of Mr. Hutton, whether of seeing the naval review or of going round the fleet with a party of paying guests, does not lay the foundation of the contract within the authorities.

Having expressed that view, I do not know that there is any advantage to be gained by going on in any way to define what are the circumstances which might or might not constitute the happening of a particular contingency as the foundation of a contract. I will content myself with saying this, that I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain. So in the present case it is sufficient to say that the happening of the naval review was not the foundation of the contract.

(1) 3 B. & S. 826.

C. A. 1903

HERNE BAY STEAM BOAT COMPANY v. HUTTON.

ROMER L.J. I am of the same opinion.

I may point out that this case is not one in which the subject-matter of the contract is a mere licence to the defendant to use a ship for the purpose of seeing the naval review and going round the fleet. In my opinion, as my Lord has said, it is a contract for the hiring of a ship by the defendant for a certain voyage, though having, no doubt, a special object, namely, to see the naval review and the fleet; but it appears to me that the object was a matter with which the defendant, as hirer of the ship, was alone concerned, and not the plaintiffs, the owners of the ship.

The case cannot, in my opinion, be distinguished in principle from many common cases in which, on the hiring of a ship, you find the objects of the hiring stated. Very often you find the details of the voyage stated with particularity, and also the nature and details of the cargo to be carried. If the voyage is intended to be one of pleasure, the object in view may also be stated, which is a matter that concerns the passengers. But this statement of the objects of the hirer of the ship would not, in my opinion, justify him in saying that the owner of the ship had those objects just as much in view as the hirer himself. The owner would say, "I have an interest in the ship as a passenger or cargo carrying machine, and I enter into the contract simply in that capacity; it is for the hirer to concern himself about the objects."

In the present case, with regard to the suggestion that there was something in the stipulation that the plaintiffs were to have the right on their part of placing ten persons on board, which would change the nature of the hiring, I need only say that there is nothing in that provision to lead the Court to treat the transaction otherwise than as an ordinary case of hiring a vessel: it does not make it in any sense a joint speculation or anything of that sort. The stipulation that the owners are "to have the right of ten persons above crew, &c., on board" only amounts to this, that in the eye of the law the defendant as the hirer of the ship licenses the owner to send ten persons on board.

The view I have expressed with regard to the general

effect of the contract before us is borne out by the following considerations. The ship (as a ship) had nothing particular to do with the review or the fleet except as a convenient carrier of passengers to see it: any other ship suitable for carrying passengers would have done equally as well. Just as in the case of the hire of a cab or other vehicle, although the object of the hirer might be stated, that statement would not make the object any the less a matter for the hirer alone, and would not directly affect the person who was letting out the vehicle for hire. In the present case I may point out that it cannot be said that by reason of the failure to hold the naval review there was a total failure of consideration. That cannot be so. Nor is there anything like a total destruction of the subject-matter of the contract. Nor can we, in my opinion, imply in this contract any condition in favour of the defendant which would enable him to escape liability. A condition ought only to be implied in order to carry out the presumed intention of the parties, and I cannot ascertain any such presumed intention here. It follows that, in my opinion, so far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sight-seeing do not form the subject-matter or essence of this contract. With regard to the one contention of fact on which the defendant relied, namely, that the plaintiffs, the owners of the ship, had on their part put themselves in the position of not having been able to carry out the contract, and so repudiated it, I can only say that the defendant has not proved his case.

STIRLING L.J. I am of the same opinion.

The plaintiffs are owners of a steam vessel for carrying passengers from Herne Bay to Gravesend and other places on the Thames. The defendant is a gentleman who seems to have formed the idea of making a profit by the conveyance of passengers on June 28 and 29 from Southampton to see the naval review, and afterwards for a cruise round the fleet. From the correspondence it appears to me to be clear that this venture was the venture of the defendant alone, and that although the plaintiffs assisted him by selling tickets and

C. A. 1903

HERNE BAY STEAM BOAT COMPANY v. HUTTON.

Stirling L.J.

posting notices of what was proposed to be done, yet the risk was entirely that of the defendant.

In that state of things the defendant entered into a contract by which the steamship belonging to the plaintiffs was to be employed by the defendant for the purpose of this venture, which, as I say, was his alone. The contract was reduced into writing. I need not read it again, but the most material part is that the vessel is to be "at Mr. Hutton's disposal" to take out the party of passengers. I agree that this contract did not amount to a demise of the ship; it was, however, a contract entered into for valuable consideration as to the employment of the ship on the two days in question; and it at least conferred this interest on the defendant, that, if the plaintiffs had attempted to violate it, that attempted violation would have been a ground for an injunction at the instance of the plaintiffs to prevent it. That is established by *De Mattos* v. *Gibson*. (1)

It is said that, by reason of the reference in the contract to the "naval review," the existence of the review formed the basis of the contract, and that as the review failed to take place the parties became discharged from the further performance of the contract, in accordance with the doctrine of *Taylor* v. *Caldwell*. (2) I am unable to arrive at that conclusion. It seems to me that the reference in the contract to the naval review is easily explained; it was inserted in order to define more exactly the nature of the voyage, and I am unable to treat it as being such a reference as to constitute the naval review the foundation of the contract so as to entitle either party to the benefit of the doctrine in *Taylor* v. *Caldwell*. (2) I come to this conclusion the more readily because the object of the voyage is not limited to the naval review, but also extends to a cruise round the fleet. The fleet was there, and passengers might have been found willing to go round it. It is true that in the event which happened the object of the voyage became limited, but, in my opinion, that was the risk of the defendant whose venture the taking the passengers was.

(1) (1859) 4 De G. & J. 276.

(2) 3 B. & S. 826.

For these reasons I am unable to agree with the learned judge in holding that in the contemplation of the parties the taking place of the review was the basis for the performance of the contract, and I think that the defendant is not discharged from its performance.

I also agree that there is no evidence that the plaintiffs repudiated the contract before any breach by the defendant.

Appeal allowed.

Solicitors: *Jones & Hamp; Biggs-Roche, Sawyer & Co.*

G. I. F. C.

THE KING *v.* BEER.

1903

May 22, 25, 28.

Municipal Corporation—Councillor—Disqualification for "holding" Office—Bankruptcy—Remedy by Quo Warranto—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 87—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32.

By s. 32 of the Bankruptcy Act, 1883, a debtor who is adjudged bankrupt is disqualified for (inter alia) being elected to or holding or exercising the office of councillor, a disqualification limited by s. 9 of the Bankruptcy Act, 1890, to five years from the date of discharge. By s. 87 of the Municipal Corporations Act, 1882, a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was at the time of the election disqualified, and shall not be questioned on that ground except by an election petition.

A debtor was adjudicated a bankrupt in April, 1899, and in the following July obtained an order of discharge subject to suspension for two years and a half, which came into operation in January, 1902. In November, 1902, an election was held of councillors for a municipal borough, at which he was nominated and declared elected. In 1903 a rule nisi was obtained for a quo warranto calling on him to shew cause why he held and exercised the office of borough councillor:—

Held, that the remedy by quo warranto was taken away by s. 87 of the Municipal Corporations Act, 1882, only in those cases where the election was questioned on the ground of disqualification for election, and that bankruptcy being by s. 32 of the Bankruptcy Act, 1883, a disqualification not merely for election, but also for "holding" the office of councillor, quo warranto would lie.

RULE NISI for an information in the nature of a writ of quo warranto calling upon one George Beer to shew by what right

1903

REX v. BEER.

he claimed to hold the office of councillor of the borough of Ealing. The following were the circumstances which led to the granting of the rule.

On April 27, 1899, George Beer was adjudicated bankrupt. On July 12, 1899, he obtained an order for discharge, subject to suspension for two years and a half; the discharge took effect on January 12, 1902. On November 1, 1902, an ordinary election of councillors for the borough of Ealing was held, and Beer was nominated and seconded and was declared by the returning officer to be elected a councillor for the Castlebar ward. On January 17, 1903, notice under s. 225 of the Municipal Corporations Act, 1882, was given to the mayor of Ealing on behalf of certain aldermen and burgesses of the borough and electors of Castlebar ward of their intention to apply for a mandamus commanding him to proceed to hold an election on a day to be appointed by the Court of a councillor for the Castlebar ward, on the ground that at the time of the election on November 1, 1902, Beer was disqualified for being elected to or holding or exercising the office by reason of having been adjudicated bankrupt, which disqualification (1) had not ceased or been removed, and that no election of a councillor had therefore been held within the time prescribed by the Municipal Corporations Act, 1882. On January 28, 1903, a rule nisi for a mandamus was granted, notice of it being, by direction of the Court, given to Beer. After argument the rule was discharged upon the ground that, Beer being the holder of the office in fact, mandamus would not lie to the mayor to hold an election for the purpose of filling the office; but a rule nisi for a quo warranto was granted directed to Beer and calling on him to shew by what right he held it.

May 28. *Danckwerts, K.C.* (*Loehnis* with him), shewed cause against the rule. Under s. 87 of the Municipal Corporations Act, 1882, this election could only have been questioned by an election petition, for the disqualification was one which

(1) The maximum period of disqualification is fixed at five years from the date of the discharge: see s. 9 of the Bankruptcy Act, 1890.

existed at the date of the election. This is a good objection, not only to proceeding by mandamus, the office being in fact full, but also to the suggested remedy by quo warranto. The effect of s. 87 was to take away in such a case the old remedy by quo warranto, and to substitute for it the remedy by election petition. This is clearly the view taken of the effect of the corresponding section of the Act of 1872 by Kelly C.B. in *Reg.* v. *Welchpool Corporation* (1), where a councillor was re-elected after he had become disqualified by bankruptcy, and it was pointed out that any remedy must be by election petition. The same view was taken by A. L. Smith J. in *Reg.* v. *Morton* (2), and those decisions should be followed. Quo warranto will not lie in respect of any disqualification existing at the date of the election. [He also cited *Hardwick* v. *Brown.* (3)]

Macmorran, K.C. (*R. Cunningham Glen* with him), in support of the rule. The remedy by quo warranto is not taken away by s. 87 of the Act of 1882. No doubt the election itself could only have been questioned by an election petition under that section, which deals with disqualification for election to an office, but the disqualification introduced by s. 32 of the Bankruptcy Act, 1883, extends also to holding or exercising the office of councillor. It cannot be that in such a case an election petition is the only remedy, for in that case, if no petition were presented within twenty-one days, the councillor would still hold the office, although he could not exercise it without subjecting himself to penalties, and the constituency would be unrepresented. No election can be held to fill an office held in fact by a disqualified person until he has been ousted from it, and this can only be done by quo warranto. Looking at the provisions of ss. 73 and 225 of the Municipal Corporations Act, 1882, it is clear that the remedy by quo warranto has only been taken away by s. 87 in cases where the disqualification is a disqualification for election to an office, and that it is left untouched as a remedy in other cases, such as the disqualification for "holding" an office introduced

(1) (1876) 35 L. T. 594. (2) [1892] 1 Q. B. 39.
(3) (1873) L. R. 8 C. P. 406.

1903

REX v. BEER.

by s. 32 of the Bankruptcy Act, 1883. [He cited *Rex* v. *Chitty*. (1)]

LORD ALVERSTONE C.J. This case raises a question of interest and of considerable difficulty. At first it came before us in the shape of a rule for a mandamus to the mayor of Ealing, calling upon him to shew cause why he should not proceed to hold an election of a borough councillor, and upon the argument the objection was taken that the office was in fact full, and that, therefore, no election could be held; and, further, that the only mode of questioning the election in fact held was by the presentation of an election petition as provided by s. 87 of the Municipal Corporations Act, 1882. After argument we were satisfied that mandamus would not lie, and that the rule, so far as the mayor was concerned, must be discharged. But it seemed open to argument that, although mandamus would not lie, a proceeding in the nature of a quo warranto would; and accordingly, upon the suggestion of the Court, the present rule nisi was obtained. The conclusion at which I have arrived upon the argument, though not without doubt, is that the remedy by quo warranto has not been taken away in the course of legislation.

It will be convenient, in the first place, to consider the provisions of the Municipal Corporations Act, 1882, in which a distinction is drawn between disqualification for election to an office and disqualification for holding an office after election, though certain things disqualify for both. Sect. 12 enacts that certain interests are to disqualify a person for being elected and for being a councillor. Then comes s. 39, the special section as to bankruptcy, which provides that if a councillor is declared bankrupt he shall thereupon immediately become disqualified and shall cease to hold the office. It might have been contended originally that this section would have disqualified him from being elected to an office as well as from holding it; but it is not necessary to decide that point; for I think the section points to bankruptcy occurring after election, and I accept the view that s. 39 applies to a councillor

(1) (1836) 5 A. & E. 609.

1903

REX v. BEER.

Lord Alverstone C.J.

who becomes a bankrupt while in office. Next we come to s. 41, by which a person acting in a corporate office without qualification is made liable to penalties, and that seems from its language to apply equally to a disqualification under s. 12 and to a disqualification under s. 39.

Then comes s. 87, on which the main argument in the present case has been founded, and which provides that a municipal election may be questioned by an election petition on the ground (inter alia) that the person whose election is questioned was at the time of the election disqualified, and that it shall not be questioned on the grounds mentioned in the section except by an election petition. That section deals with a personal disqualification, and the objection can only be raised by means of an election petition; the right to a mandamus is taken away. Finally, there is s. 225, which deals with the writ of quo warranto, and provides that it is not to be granted after the expiration of twelve months from the time when the holder of the office became disqualified after election; and s. 73 should also be noticed, which section shews that for some purposes quo warranto is contemplated as an appropriate remedy, for it makes an election valid unless it is questioned within twelve months after the election either by election petition or by information in the nature of a quo warranto. We have to consider whether the remedy by quo warranto has been taken away and that by election petition substituted in cases in which the disqualified person is a person holding the office or being in the office. I confess that when I read the case of *Reg.* v. *Chester Corporation* (1), in connection with the judgment of Kelly C.B. in *Reg.* v. *Welchpool Corporation* (2), I felt some doubt. In the former case it was held to be "an inflexible rule of law that where a person has been de facto elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a quo warranto information; and that a mandamus will not lie unless the election can be shewn to be merely colourable"; and in *Reg.* v. *Chester Corporation* (1) that principle was

(1) (1855) 25 L. J. (Q.B.) 61.

(2) 35 L. T. 594.

1903

REX v. BEER.

Lord Alverstone C.J.

reaffirmed; but Kelly C.B. in his judgment went on to say: "It appears to me, therefore, that where there has been an election de facto, an election in fact acted on, there is no authority for holding that it is impeachable by mandamus; but it can only be impeached by quo warranto under the old law or now by petition under the Corrupt Practices at Municipal Elections Act." I think, however, that the effect of the Act of 1882 has not been to take away the old remedy by quo warranto in such cases. For myself, I think that if it had been intended by s. 87 to take away quo warranto as a remedy against a man alleged to be improperly holding an office, such an alteration of the law would have been enacted in clear language; and in *Reg.* v. *Welchpool Corporation* (1) the Court did not hold that the election could not be questioned by quo warranto, but only that it could not be questioned by mandamus. It is clear from the language of the sections cited that the remedy by quo warranto still remains for some purposes, and I can see no reason why it should not be an appropriate remedy in the case of the disqualifications imposed by s. 12.

There remains the question whether the disqualification under s. 32 of the Bankruptcy Act, 1883, which provides that a person adjudged bankrupt shall be disqualified for (inter alia) "being elected to or holding or exercising the office of mayor, alderman, or councillor," is within the category of continuing disqualifications which afford good ground for a proceeding by quo warranto, if the right to that remedy has not been taken away by the Municipal Corporations Act, 1882. The language of the section points to three things: election to the office, holding (that is, filling and keeping) the office, and exercising the office, and a person who is adjudged bankrupt is disqualified for all three, and no doubt one of the objects of the Legislature was to ensure that bankruptcy should operate as a disqualification, not merely for the holding of an office, but also for election to it. In s. 12 of the Act of 1882 certain disqualifications were enumerated which prevented a man from being elected, or being, a councillor; it did not deal with his "exercising" the office, nor was it really necessary

(1) 35 L. T. 594.

that it should do so, for by s. 41 the exercise of such an office by a disqualified person renders him liable to penalties. It is true that s. 87 says that an election shall only be questioned by election petition where the ground of the objection is disqualification at the time of the election; but I do not think that this extends to the continuous holding of the office by the person so disqualified; if it did, the constituency would in fact be disfranchised or unrepresented if no election petition were presented within twenty-one days of the election, for the councillor would hardly act in his office seeing the heavy penalties to which he would be liable for so doing. No other remedy than that by quo warranto has been suggested by which a bankrupt can be prevented from holding such an office, and I can see no reason why that remedy is not open to the prosecutors. In my opinion the word "holding" in s. 32 of the Bankruptcy Act, 1883, is equivalent to the word "being" in s. 12 of the Municipal Corporations Act, 1882, and s. 32 amounts to a statutory declaration that a bankrupt may not hold a municipal office, whether he has been duly elected to it or not. Therefore, although mandamus will not lie because the election itself cannot be questioned, and although s. 39 of the Municipal Corporations Act, 1882, applies to a disqualification by bankruptcy arising after the election, I think that where there is a continuing disqualification the right to hold the office may still be questioned by quo warranto, and that this rule should be made absolute.

CHANNELL J. I am of the same opinion. The question turns entirely on the true construction of s. 32 of the Bankruptcy Act, 1883, and s. 12 of the Municipal Corporations Act, 1882; the other questions which have arisen are questions of election law and are well settled. It is settled law that, if an office is full in fact, there cannot be a writ of mandamus to hold a fresh election on the ground of the disqualification of the holder, at any rate not if the office is such that a writ of quo warranto would lie in respect of it, in which case it would be necessary to make use of that mode of procedure in order to get the holder out of the office before applying for a

1903

REX v. BEER.

Channell J.

mandamus to hold a fresh election. That well-settled principle applies to the present case, and therefore we discharged the rule for a mandamus, for whether Mr. Beer is qualified to hold the office of councillor or not, he is the holder de facto.

The question of proceeding by quo warranto is one of more difficulty. It is clear that Mr. Beer was disqualified from being elected at the time of the election, and that his election might have been questioned by an election petition; that being so, quo warranto will not lie to question the election, for the purpose of questioning which an election petition is, by s. 87 of the Act of 1882, the only appropriate procedure. But if, in addition to being disqualified for election, he was also disqualified for holding the office, then the position of affairs is that an office is being held de facto by an unqualified person, and the proper mode of procedure is by way of quo warranto. In my opinion that remedy is only taken away in cases where an election petition will lie, and disqualification by reason of "holding" an office can only arise after the election has been held. The question, therefore, is whether a disqualification by reason of bankruptcy, which existed before and at the time of the election, is a disqualification for "holding" the office of councillor, or whether the disqualification for "holding" it only arises where the bankruptcy takes place after the election. That depends on the proper interpretation of s. 32 of the Bankruptcy Act, 1883, which disqualifies a bankrupt for "being elected to, or holding, or exercising" the office. If that section means that a person is disqualified from being elected to the office if the bankruptcy has taken place before the election, and from holding the office if the bankruptcy happens afterwards, it seems unnecessary, because that had already been dealt with by s. 39 of the Act of 1882. The proper construction of the section is, I think, that during the period of five years from the discharge (fixed by s. 9 of the Bankruptcy Act, 1890) a bankrupt is disqualified both from being elected to the office and from holding the office if elected to it, and therefore necessarily from exercising it. If that is the true meaning of the section, everything else seems to follow. There is a councillor de facto holding an office which

he is disqualified for holding; the only and proper remedy is by quo warranto, in which judgment of ouster will be obtained; and then steps may be taken to obtain a mandamus to hold an election.

1903
REX
v.
BEER.

Rule for mandamus discharged.
Rule for quo warranto made absolute.

Solicitors for prosecution: *Woosnam & Smith.*
Solicitors for defendant: *Gadsden & Treherne.*

W. J. B.

ROBINSON BROTHERS *v.* DIXON.

1903
April 1;
July 7.

Revenue—Excise—Spirits—Extraction of Spirits from Wood of Empty Cask—Possession of Spirits naturally exuding from Wood of Cask—Finance Act, 1898 (61 & 62 *Vict. c.* 10), *s.* 4, *sub-s.* 1.

By s. 4, sub-s. 1, of the Finance Act, 1898, "A person shall not (*a*) subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof; or (*b*) have on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask":—

Held, that, in order to convict of the offence of having on the premises spirits extracted from the wood of a cask, the spirits must have been extracted either by an active process intentionally applied to the cask for that purpose, or by allowing the cask to remain in a position where it would be affected by the external temperature, with the knowledge that the temperature would cause the spirits to exude from the wood and collect in the bottom of the cask; but that the innocent possession of spirits which had, owing to the operation of natural causes and without any intent on the part either of the owners or of their servants, exuded from the wood and collected at the bottom of the cask did not amount to the possession of spirits "extracted" from the wood of the cask within the meaning of the section:

Held, further, that the owners of the cask would be liable under the section for the intentional act of their servants, though committed without their own knowledge or approval.

CASE stated by justices for the county of Durham.

An information under s. 4, sub-s. 1 (*b*), of the Finance Act, 1898, had been laid by the respondent against the appellants, charging them with having on their premises certain spirits

1903

ROBINSON BROTHERS v. DIXON.

extracted from the wood of certain casks in contravention of the statute. At the hearing the following facts were proved:—

A supervisor of inland revenue found on the premises of the appellants two casks which were bunged and were standing under a tree. Upon examination he found that one of them contained more than a quart of rum, while the other contained somewhat less than a quart of spirit. An analyst from the department of Inland Revenue gave evidence that in each case the spirit had been extracted from the wood of the cask. The casks, after their contents had been pumped out, were placed in the place where they were found until an opportunity should arise for selling the rum cask to a customer and returning the spirit cask to the distillery from which it had originally come. The justices found that the casks had not been subjected by the appellants to any process for the purpose of extracting spirit from the wood thereof, but in view of the evidence that the spirits had come from the wood of the casks, and of the fact that the spirits had been found in the casks on the premises of the appellants, they convicted the appellants.

The question for the opinion of the Court was whether the words of s. 4, sub-s. 1 (*b*), "extracted from the wood of any cask," covered the accumulation in the cask of spirit that had exuded from the wood without any active or permissive process on the part of the appellants.

At the hearing of the appeal on April 1 the case was sent back to the justices for amendment, there being no finding that the casks had not been subjected by the servants of the appellants to any process for extracting the spirit from the wood. The case was now returned with a further paragraph stating that the justices found that the casks were placed where they were found to await removal or disposal, and that neither the appellants nor their servants had subjected either cask to any process for the purpose of extracting spirits from the wood thereof.

Bruce Williamson, for the appellants. The conviction was wrong. The prohibition contained in s. 4 is directed against the intentional application of any process to an empty cask

for the purpose of extracting the spirit absorbed in the wood of the cask, and also against the possession of any spirit extracted from the wood of the cask by any process intentionally applied. The words in sub-s. 1 (*b*), "or any spirits extracted from the wood of any such cask," must be read with reference to the preceding words, "which is being subjected to any such process"; the mere possession of spirits which have exuded from the wood of an empty cask is not sufficient to bring the case within the section. Exudation is not extraction, which means the drawing out of the spirit from the wood by means of some active process intentionally applied. If the conviction is right, a carrier would also be liable if, before delivery of such casks to the consignee, spirits exuded from the wood owing to the heat of the weather and were found in the bottom of the cask. In the Scottish cases of *Lord Advocate* v. *Stewart* (1) and *Lord Advocate* v. *Carse* (2) an active process was applied to the casks for the purpose of extracting the spirit, and those cases are not in point. It is true that in *Reg.* v. *Woodrow* (3) the innocent possession of adulterated tobacco was held to be an offence; but in that case the prosecution was under a section expressed in clear and unequivocal language, which rendered a mens rea an unnecessary ingredient of the offence. In the present case a mens rea might possibly not be necessary if the casks had been subjected to a process for the extraction of spirit by the appellants' servants without their knowledge or consent; but such a supposition is negatived by the finding of the justices.

Sir R. B. Finlay, A.-G. (*Rowlatt* with him), for the respondent. The conviction was right. An offence is committed within the meaning of the section if the spirit is in fact extracted from the wood of the cask, although it may not be done by any deliberate process, but merely by the ordinary process of evaporation and condensation. There is nothing in s. 4 to shew that there must be an intention to extract the spirits; it makes the mere possession of spirits which have been in fact extracted from the wood of the cask an offence,

(1) (1899) 63 J. P. 311. (2) (1899) 63 J. P. 472.
(3) (1846) 15 M. & W. 404.

1903

ROBINSON BROTHERS v. DIXON.

and the case of *Reg.* v. *Woodrow* (1) is entirely in point. Secondly, under the circumstances of the case there was evidence of an intention to extract the spirits, for the casks could not have been placed in the position in which they were found without knowledge that the spirit would in fact be extracted by the heat of the sun, and, therefore, not without intent that it should be so extracted. (2)

Bruce Williamson, in reply.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The question for us turns entirely on the construction of this section, which creates a criminal offence of a serious nature and punishable with a fine of 50*l*. The section deals with two matters: first, with the subjecting of a cask to a process for the purpose of extracting spirit from the wood; as to which I may remark that the natural meaning of "extracting" is "drawing out" and not "exuding," and that the process must be applied for the purpose of the extraction. The section deals in the second place with the offence of having a cask on the premises which is being subjected to such a process, or having spirits on the premises which have been extracted from the wood of a cask. The Attorney-General contends that the offence has been committed where spirit has in fact exuded from the wood of the cask in consequence of climatic influence, whether the cask has been subjected to any process for the purpose of extraction or not. I think that that is not so, and that the contention is negatived by the language of sub-s. 3 of the same section, which runs as follows: "All spirits extracted in contravention of this section shall be deemed to be spirits unlawfully kept or deposited within the meaning of the Spirits Act, 1880, and every cask which is being subjected to any such process, or which, being upon premises upon which spirits so extracted are found, has been subjected to any such process, shall be forfeited." I think that this language shews that it was not meant to include as

(1) 15 M. & W. 404.

(2) The second point was not insisted upon at the second hearing, having been disposed of by the additional finding of the justices when the case was sent back to them.

an offence the innocent possession of spirits which had collected by reason of exudation without subjecting the cask to any process for the purpose of collecting them. When this case was before us originally, the suggestion that a process active or permissive had been applied by the appellants to the cask was negatived by the justices, but it was suggested that their servants might have had something to do with or knowledge of the mode in which the spirits had collected in the casks, and the case was sent back for a fuller statement of the finding of the justices. Now the case comes back to us with two further important findings: first, that the casks were awaiting removal from the appellants' premises; and, secondly, that neither the appellants nor their servants had subjected either cask to any process, thus putting the servants in the same position as the appellants themselves. The findings of fact negative the idea that any process was applied to the casks with the knowledge of the appellants or their servants. The evidence shews that the casks were screened from the action of the sun, and that the spirits were not taken out of the casks, but were found in them. There seems to me to be a great deal in the argument on behalf of the appellants that, if the construction contended for by the Crown is right, the mere innocent possession of a cask, from the wood of which spirit has exuded owing to the heat of the sun, as in the case of a carrier, would make the possessor liable to the severe penalty imposed by this section. I think, therefore, that some reasonable limit must be placed on the meaning of the word "extracted," and that it has no application where the spirit merely exudes in fact, but only where the spirit is extracted by some process, natural or artificial, which the person allows to be applied.

WILLS J. I have come to the same conclusion. The case is not wholly free from difficulty, and many suggestions may be made as to the resulting inconvenience or injustice on the one hand or on the other according to the construction we place upon the section. Our decision may perhaps leave it open to a man to leave a cask in a position where he well knows the heat of the sun will extract the spirit from the

1903

ROBINSON BROTHERS v. DIXON.

Wills J.

wood; on the other hand, we have the serious difficulty in which railway companies and other carriers would be placed if the innocent possession of a cask from which spirits had in fact exuded were held to constitute a criminal offence. There is at least no serious inconvenience in the construction which we are placing on the section. I agree that "extract" means something more than "exude," and the appeal must be allowed.

CHANNELL J. I am of the same opinion. Speaking for myself, I think that the meaning of the section is clear, but I feel some little difficulty as to whether the particular facts of this case bring it within the statute. For I think that if the appellants' servants, without the knowledge of the appellants, had placed the casks where the sun could reach them, knowing the effect that the sun would have upon them, the spirits would have been extracted from the wood of the cask within the meaning of the section, and the appellants, being in possession of spirits so extracted, would have been liable to be convicted under this section. But the justices have now found that the casks were not intentionally placed in the position in which they were found, and, that being so, the statute has no application. Our decision does not mean that the person in whose possession the spirits are found must, in order to bring him within the section, be a party to their extraction; intentional extraction by his servants would be enough; and this view of the law seems sufficient to enable the Crown to enforce the provisions of the section in all ordinary cases.

Appeal allowed.

Solicitors for appellants: *Cunliffes & Davenport, for J. G. Wilson, Ornsby & Cadle, Durham.*

Solicitor for respondent: *Solicitor to the Inland Revenue.*

W. J. B.

SMITH *v.* SIBRAY, HALL & CO.

1903
July 7.

Factory Acts—Overtime Employment—Place where allowed—"Warehouse not used for any Manufacturing Process"—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 49, *Sched. II., clause* 4.

By s. 49 of the Factory and Workshop Act, 1901, overtime employment of women is permitted on a limited number of days in the year, and this permission is declared to apply to "the non-textile factories and workshops and parts thereof and warehouses specified in the second schedule to this Act." By Sched. II., factories and workshops in which overtime employment is allowed include (clause 4) "any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods":—

Held, that the prohibition in Sched. II., clause 4, against overtime work being carried on in a part of a factory used for a manufacturing process or handicraft, extended to any part of the factory in which a manufacturing process or handicraft was carried on during the ordinary working hours, and did not merely prevent the overtime work being carried on in a part of the factory which was at the same time being used for a manufacturing process or handicraft.

CASE stated by the stipendiary magistrate for Sheffield, from which the following facts appeared.

The respondents had appeared to an information laid by the appellant, an inspector of factories, alleging that on December 19, 1902, the respondents were occupiers of a factory within the meaning of the Factory and Workshop Act, 1901, and that on that day a woman named Jane Wood was employed after 8 P.M. contrary to the provisions of the Act. There was a second information as to another woman, named Frances Colley.

At the hearing it appeared that the respondents were the occupiers of a factory used for the manufacture of silver and silver plate; they also manufactured electro-plated goods, but only to the extent of about 2½ per cent. of their total work. On the day in question two factory inspectors visited the respondents' works about 9 P.M. and found the two women, Wood and Colley, at work there, one of them being engaged in

1903

SMITH v. SIBRAY, HALL & Co.

burnishing a vase, and the other burnishing the lid of the vase; each of them was using a small burnishing tool, and they also had in use a "picking" tool, which was used for picking out bits of dirt from the object on which they were at work and for preventing injury to the fingers in rubbing.

The learned magistrate, after hearing expert evidence as to the nature of the process upon which the women were employed, was of opinion that they were not engaged in burnishing, but that the work was such picking and rubbing and cleaning or polishing as is within Sched. II., paragraph 4, of the Act of 1901.

Ordinary time is defined by s. 26 of the Act of 1901 as being from 6 A.M. to 6 P.M., 7 A.M. to 7 P.M., or 8 A.M. to 8 P.M., the ordinary time in the respondents' factory at the time of the complaint being from 8 A.M. to 8 P.M. The room in which the women were at work was known as the warehouse or warehouse department of the works, and burnishers usually worked in it, though not after 8 P.M. and not on the evening in question. It was contended on behalf of the appellant that, inasmuch as women were from time to time employed in that part of the factory up to 8 P.M. in the manufacturing process of burnishing, and not solely in polishing, cleaning, wrapping, or packing up goods, that part of the factory was not, within the meaning of Sched. II., clause 4, "a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods."

The learned magistrate was of opinion that burnishings done in silversmiths' factories and non-textile factories in ordinary time were excluded by Sched. II., clause 4, of the Act from the processes allowed to be carried on in overtime; but he was of opinion that when burnishing, though carried on in the warehouse department, was carried on in ordinary time only and not in overtime, the two times must be looked at separately, and that the fact of carrying them on there in ordinary time did not prevent the warehouse department from being within the meaning of Sched. II., clause 4, a place where overtime might be worked as being a place "not used for any manu-

facturing process or handicraft," because the persons then using it were solely employed in polishing, cleaning, wrapping, or packing up goods. He therefore dismissed the summonses.

The question for the opinion of the Court was thus stated: "If the Court is of opinion that the burnishing which was done in the defendants' factory's warehouse in ordinary time was a polishing and cleaning allowable for Sched. II., clause 4, overtime, or if the Court is of opinion that it was not allowable, but did not affect the Sched. II., clause 4, overtime because it was done in ordinary time only, the two complaints are to stand dismissed on the ground that the offence complained of has not been committed. If the Court is of opinion that the burnishing done was not allowable for Sched. II., clause 4, overtime, and that doing it in ordinary time where the Sched. II., clause 4, overtime was done affected the working done there in Sched. II., clause 4, overtime, although it had been done in ordinary time only and was not done when the Sched. II., clause 4, overtime was being done, the dismissal on the ground that no offence was thereby committed is to be held erroneous in point of law, and the offence charged is to be held to have been committed, and the two complaints are to stand dismissed on the ground that the offence charged has been committed, but they have been dismissed on these particular accounts without convictions under s. 16 of the 1879 Summary Jurisdiction Act."

H. Sutton, for the appellant. The magistrate was wrong. Sect. 49 of the Factory and Workshop Act, 1901, is in relief of the employer, but he must shew that he comes within the exception in Sched. II., clause 4. The section itself imposes a limit upon the hours during which overtime may be worked; the schedule limits the kind of work allowed to be performed in overtime, and further limits the place in which it is to be done. The words "not used for any manufacturing process or handicraft" mean "never used" for that purpose; they should not be read as meaning "not being used at the time" for a manufacturing process, &c. There are two reasons against adopting the latter interpretation: first, the nature of the

1903

SMITH v. SIBRAY, HALL & Co.

manufacturing process carried on during the daytime might be such as to vitiate the air, as by giving off dust, and render it injurious to the health of those coming in to work overtime; and, secondly, it would greatly facilitate the evasion of the statutory prohibition, for the factory inspector would have great difficulty in detecting infringements of the provisions as to the kind of work allowed to be done in overtime.

J. A. Slater, for the respondents. Assuming that burnishing is a manufacturing process, this room was a place where overtime work could properly be carried on. The language of Sched. II., clause 4, means that the room is not being used for a manufacturing process or handicraft at the time when the overtime work is being done. If this were not so, it would be impossible in a small manufactory, consisting of a single room, for overtime work ever to be carried on at all.

H. Sutton, in reply.

LORD ALVERSTONE C.J. I think that the decision of the learned magistrate was wrong, and that the case must be remitted to him. It is not necessary for me to attempt an exact definition of what is meant by overtime; it may on the one hand mean any employment of female workers between the hours of 8 and 10 P.M., the alternative meaning being employment of a female worker after she has previously worked for the ordinary time of twelve hours on the same day; for it is admitted by both parties to the present case that the only justification for the employment of these two women at the hour of the inspectors' visit was that they were working overtime as contemplated by the Act. Now, overtime employment of women, subject to certain conditions, is allowed by s. 49 of the Factory and Workshop Act, 1901, in "the non-textile factories and workshops and parts thereof and warehouses specified in the second schedule to this Act," and that schedule, after enumerating a large number of non-textile factories which it is unnecessary for me to notice, proceeds in clause 4 to allow overtime in "any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft and in which persons are solely employed

in polishing, cleaning, wrapping, or packing up goods." The appellant contends that the words "not used for any manufacturing process or handicraft" are descriptive of the class of room or place in which limited employments may be carried on; in other words, that they mean in a part of the factory which is never used for a manufacturing process or handicraft; the respondents, on the other hand, contend that they mean not being so used at the time when overtime is being worked. The words are open to either construction; it is plain, however, that more is intended than the actual work which is being done at the time, for the statute has in Sched. II., clause 4, limited that which may be done in overtime to the operations of polishing, cleaning, wrapping, or packing up goods, and in addition the overtime must be worked in a part of a factory or workshop which is a warehouse not used for any manufacturing process or handicraft.

Is it more in consonance with the general object of factory legislation that this language should mean that the warehouse is never at any time used for a manufacturing process or handicraft, or that it is not being so used at the time that the overtime is being worked? Looking at the general scope of this legislation, I am of opinion that the contention of the appellant is correct. It has been suggested that a contrary decision would make it easy for employers to evade the Act, and it is certainly most desirable that the place where the permitted overtime is carried on should be a place where there would be no facility of evasion. The inspector is not always at hand, and it is easy to imagine cases where, if overtime were allowed to be worked in a room where a manufacturing process is carried on during the ordinary working hours, it would be easy for the hands to pass from one class of work to another without the possibility of detection. And, further, there may be sanitary reasons why overtime should not be worked in rooms in which manufacturing processes involving, for instance, the raising of a quantity of dust, have been carried on during the ordinary hours of work. I think, therefore, that, in addition to the limitation of employments in which overtime is allowed, the statute has also imposed a limitation upon the character of the place

1903

SMITH v. SIBRAY, HALL & CO.

Lord Alverstone C.J.

used for working overtime; in other words, I think that the language of Sched. II., clause 4, points to the general character of the place, and not to the purpose for which it is being used at the particular time. I have, therefore, come to the conclusion that this was a place in which the working of overtime was not justified, on the ground that the place was used for a manufacturing process or handicraft during the ordinary working hours.

WILLS J. I am of the same opinion. Speaking for myself, I think that the matter is pretty clear. The employment of women in factories is permitted only during specified periods of the day, in all cases limited to twelve hours, which may be from 6 to 6, or from 7 to 7, or from 8 to 8, according to the hour at which the day's work begins; but there is this exception—that on a limited number of days in the year overtime not exceeding two hours may be worked. It is difficult to say whether overtime means the two hours from 6 to 8, or from 7 to 9, or from 8 to 10, for this must vary with the different sets of workers, according to the hour at which they started work, though I think that overtime begins as soon as the twelve hours of the ordinary day are finished; but it is unnecessary to decide that question, as in any point of view 9 o'clock, which was the time of the inspector's visit, must be overtime. The only question we need consider is whether the respondents, the employers, come within the exception in Sched. II., clause 4. No doubt the language of the exception is susceptible of two interpretations, but I think it is more consonant with the view that the warehouse in which overtime is worked is not to be used at any time for other purposes than those of polishing, cleaning, wrapping, and packing up. It seems clear to me that the Legislature intended to make a general provision applicable to all non-textile factories, and, therefore, the argument that in this particular instance it was not more objectionable to do the overtime work in a part of the factory where a manufacturing process had been carried on earlier in the day than in a part solely devoted to work of the description allowed to be performed in overtime goes

for nothing, for no doubt there may be many other trades in which there is a good reason for the prohibition. And it is clear that the construction contended for by the respondents would in many cases greatly facilitate the evasion of the statutory requirements.

CHANNELL J. I agree. There is no doubt that the language of Sched. II., clause 4, is capable of two meanings: it may mean that the room used for overtime work is not to be used at the same time for a manufacturing process or handicraft, or it may mean that the room is not to be so used at any time during the day. At first I felt some difficulty in understanding why the Legislature, in protecting women against being employed in factories for more than a certain number of hours per day, should have said that, although on a limited number of days they may be employed beyond those hours upon a certain specified class of work, they may only be so employed if the place in which the overtime work is performed is one which during the whole day is used only for the class of work allowed to be performed in overtime. But I think that the reasons advanced by the appellant are cogent. It may be that the manufacturing process carried on in the daytime is unhealthy, or such as to vitiate the atmosphere of the place in which it is carried on and render it deleterious to the women who afterwards use it for the purpose of their overtime work. And there is the equally important objection of the facility that would be afforded to the evasion of the requirements of the statute; for if the place where women work overtime were permitted to be the same place as that in which a manufacturing process has been carried on during the day, and in which machinery is used for that manufacturing process, evasion could not be prevented, and it would be easy enough, on the occasion of the inspector's visit, for a woman who had just previously been engaged in a manufacturing process to be found doing legitimate overtime work. This affords a sufficient reason for the action of the Legislature, not only in enacting that no woman should be employed after 8 P.M. except on certain specified work, but also for the provision that the

1903

SMITH v. SIBRAY, HALL & Co.

place used for doing that work is not to be used at any time of the day for any manufacturing process or handicraft.

Appeal allowed.
Case remitted to magistrate.

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitors for respondents: *Gibson & Weldon, for Newsom, Sheffield.*

W. J. B.

1903
July 8.

MILES *v.* HUTCHINGS.

Criminal Law—Malicious Injury to Property—Shooting at Dog—24 & 25 Vict. c. 97 (Malicious Damage Act, 1861), s. 41.

An information under 24 & 25 Vict. c. 97, s. 41, was laid against the appellant, a gamekeeper, for unlawfully and maliciously killing a dog; the dog was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes.

Held, that the test of the appellant's liability under the section was whether he acted under the bonâ fide belief that what he was doing was necessary for the protection of his master's property, and that it was the only way in which the property could be protected.

Daniel v. *Janes*, (1877) 2 C. P. D. 351, considered.

CASE stated by justices for the county of Southampton.

The appellant had been summoned to answer an information laid by the respondent under 24 & 25 Vict. c. 97, s. 41, charging him with having unlawfully and maliciously killed a dog, the property of one Sheldon.

At the hearing of the information it was proved, and the justices found as facts, that the appellant was a gamekeeper; that on the day in question he saw a fox-terrier dog near an aviary in which pheasants, the property of his master, were confined for breeding purposes; that he fired twice at the dog, which was at the time wearing a collar with its owner's name and address legibly engraved upon it; and that the dog died from the effect of the shots. It was stated on behalf of the appellant that the pheasants had been much troubled and

injured by stray dogs; that there was a notice-board warning persons against allowing dogs to stray near the aviary, and that some persons had been asked to keep their dogs away from it; that Sheldon, the owner of the dog in question, had not been personally warned, as the appellant did not know that he kept a dog; that the appellant shot at the dog with the intention of driving it away and not with the intention of killing it, and that he thought it necessary to shoot at the dog in order to protect his master's property. The justices were of opinion that the evidence brought the case within the operation of the statute, and that the appellant had no right to shoot the dog; they therefore convicted and fined the appellant.

The questions for the opinion of the Court were: (1.) Whether the case was within s. 41 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). (2.) Whether the appellant could be legally convicted of the offence charged.

Cancellor, for the appellant. The conviction was wrong. The facts do not bring the case within s. 41. In *Daniel* v. *Janes* (1), where poisoned meat was laid down in order to poison a dog, Lord Coleridge C.J. laid it down that the section pointed to the commission of a wicked act and not to an act done under an impression, right or wrong, that the party doing it was justified in doing it in order to protect his premises from trespass; and that decision was followed in *Smith* v. *Williams* (2), where chickens had been intentionally shot while devouring wheat. [He also cited *Bryan* v. *Eaton*. (3)]

The respondent did not appear.

LORD ALVERSTONE C.J. This case raises a question of considerable importance, which has on more than one occasion been under the consideration of the Court. I think, however, that the facts at present stated are insufficient to enable us to deal satisfactorily with the case, and that it must be sent back

(1) 2 C. P. D. 351. (2) (1892) 9 Times L. R. 9; 56 J. P. 840.
(3) (1875) 40 J. P. 213.

1903

MILES v. HUTCHINGS.

Lord Alverstone C.J.

to the justices for a further statement. The justices say that it was stated on behalf of the appellant that he shot at the dog, not with the intention of killing it, but with the intention of driving it away; when, however, they come to the expression of their opinion on the case, they merely say that the appellant had no right to shoot the dog; they have not dealt with the important question whether the appellant bonâ fide believed that the only way of protecting his master's property was to act as he did—a point upon which it is most desirable to have their finding.

In *Daniel* v. *Janes* (1) Lord Coleridge C.J. said: "The 41st section of the Act, upon which the conviction proceeded, points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to simply for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given." Without agreeing with all that is there said, I think that the test in the present case may be whether the appellant bonâ fide believed at the time that what he was doing was necessary for the protection of his master's property; if he did so believe, the charge of unlawfully and maliciously killing the dog is negatived; if, however, he fired at the dog unnecessarily, and without any such bonâ fide belief, I think that the offence of unlawfully and maliciously killing the dog would be made out. On this point, therefore, it is necessary that the case should go back to have the facts more clearly stated.

WILLS J. I agree. In my opinion the case of *Daniel* v. *Janes* (1) was correctly decided upon the facts before the Court; but the test laid down by Lord Coleridge C.J. involves a general proposition which, I think, puts somewhat too broadly the right of a person to do an act of the kind in question. It is in my judgment not enough that he should be under the impression, right or wrong, that he is justified in protecting his premises from trespass or (as in the present

(1) 2 C. P. D. 351.

case) his master's property from injury; if he knows that much less violent measures would attain his object, he is not justified in resorting to such means as killing or wounding the animal. I think that the test laid down by my Lord is more accurate and a safer guide in practice.

CHANNELL J. I also agree that the case must be sent back. The existence of a malicious intention would be negatived if the appellant wrongly, but honestly, believed that it was necessary to shoot at the dog in order to drive him away; but while the justices have found that the shooting was unnecessary, they have found nothing as to the appellant's bonâ fide belief.

Case remitted to justices.

Solicitor for appellant: *Snelling, Winchester.*

W. J. B.

C. A.
1903
April 24;
July 25.

[IN THE COURT OF APPEAL.]

POMFRET *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Employer and Workman—Compensation—Accident—"Arising out of and in the course of the Employment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

Upon an application for compensation under the Workmen's Compensation Act, 1897, the burden is upon the applicant of giving evidence to shew that the accident arose "out of" as well as "in the course of" the employment of the injured workman. Although the fact that the accident happened in the course of the employment may be admitted, that burden is not discharged if the manner in which the accident happened is left wholly unexplained, and if the evidence is equally consistent with the view that it happened in consequence of something which did not arise out of the employment.

Wakelin v. *London and South Western Ry. Co.*, (1886) 12 App. Cas. 41, considered and applied.

APPEAL of the respondents from an award of the judge of the Manchester County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The application was made by the widow, on behalf of herself and her three children, of a fireman in the service of the respondents, who met with fatal injuries through an accident which admittedly arose in the course of his employment, but which the respondents contended did not arise out of it.

It appeared from the judge's notes that at the hearing of the application on March 13, 1903, the following facts were agreed upon. The deceased was a fireman. It was his duty to book on at the locomotive department, Newton Heath, and to receive a check and his instructions, and to book off at the same place. On December 27, 1902, he booked on at 5.30 A.M., and was fireman to Charles Williams, an engine-driver, and worked a special goods train between Miles Platting and Stalybridge. He was relieved at Charleston Station, Ashton, at 5 P.M., and remained in the porters' room with Williams until

5.15. He was entitled to travel back to Newton Heath by train. He was found at 5.20 under the Oldham Road Bridge between the rail and the wall, with his head towards Manchester, and died from the effects of his injuries. The lock and catch of the door were in order when examined. There was glass on the seat of the carriage with traces of blood and hair on it.

To supplement these admitted facts a witness named Moulton was called by the applicant. He stated that he was a clerk, and travelled in a third-class compartment of the train leaving Charleston for Manchester at 5.14 P.M. Williams, the engine-driver, got in after him, and sat down opposite the witness with his face to the engine just inside the door. The deceased then got into the compartment and passed the witness, and as the train moved out of the station the deceased lowered the window on the farther side of the carriage. The witness was talking to Williams, and when the train had gone about 300 yards he heard a bang and a crash and saw that the deceased had disappeared. The window was open after the accident, but the door was caught, the handle being partly turned; it was a door the lock of which caught when the door was slammed. The window was broken. The hinges of the door were on the side of the door next the engine.

It was contended on behalf of the railway company that the applicant had made out no case, as the onus of proof that the accident arose out of the deceased's employment lay upon her; but the county court judge held that, the fact of an accident being admitted, and the fact of employment being admitted, the case was within the Act unless the railway company could prove that the injuries arose from some cause which relieved them from responsibility. It was then further contended for the railway company that the evidence was consistent with the deceased having opened the window and leaned out whereby he turned the handle of the door, or with his having opened the door for some purpose other than that of his employment, and that, if either of these theories were correct, the accident, on the principle of *Smith* v. *Lancashire and Yorkshire Ry.*

C. A. 1903

POMFRET v. LANCASHIRE AND YORKSHIRE RAILWAY.

Co. (1), did not arise out of his employment, and the applicant was not entitled to compensation.

The county court judge was, however, not satisfied that either of these theories was correct; he found that the deceased died from an accident arising out of and in the course of his employment, and made an award in favour of the applicant for an agreed sum. The railway company appealed.

April 24. *C. A. Russell, K.C.*, and *Spencer Hogg*, for the railway company. The county court judge misdirected himself. The burden was upon the applicant of shewing that the accident arose out of, as well as in the course of, the employment; but this burden of proof was not discharged, the evidence going no further than to shew that this was an unexplained accident. In the ordinary case of an action against a railway company, where their liability to damages depends upon negligence, the plaintiff cannot recover if he merely shews an unexplained accident; the onus is upon him of giving some evidence of negligence as a foundation of the company's liability: *Wakelin* v. *London and South Western Ry. Co.* (2) Under the Workmen's Compensation Acts it is, of course, unnecessary to prove negligence; but the applicant must give some evidence to shew that the accident arose out of the deceased's employment before a primâ facie case of liability to pay compensation is made out. [He also cited *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1); *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (3)]

J. R. Randolph, for the applicant. There was no misdirection. The county court judge drew the inference from the evidence that the accident happened to the deceased while he was properly travelling in the train in order to get to the place where his day's work ended, and that he was doing no more than an ordinary passenger in a railway train would do; having drawn this inference, he was justified in finding as a fact that the accident arose out of his employment. [He cited *McNicholas* v. *Dawson.* (4)]

(1) [1899] 1 Q. B. 141.
(2) 12 App. Cas. 41.
(3) [1902] 2 K. B. 178.
(4) [1899] 1 Q. B. 773.

COLLINS M.R. I regret to say that we are not unanimous in our conclusion on this question, but we are all of opinion that the case should be sent back to the county court judge. In my opinion the learned county court judge has misdirected himself. His direction is in the following terms: "I hold that, the fact of an accident being admitted, and the fact of the employment being admitted, unless the respondents can prove that the injuries arose from some cause which relieved them of responsibility, I should hold the case to be within the Act." That certainly seems to me to involve misdirection. I think that in this case, as in every other, the burden of proof is thrown upon the applicant, and that, the statute having enacted that the condition of the employer's liability is that the accident must have arisen out of as well as in the course of the employment, the applicant who seeks to obtain compensation on that footing must, in order to succeed, prove both those conditions to have been fulfilled. In the present case, however, the only evidence upon which the learned judge acted, as explained by the principle upon which he acted, was that during the employment of the deceased he met with an accident. That seems to me to be the principle which he applied to the case; it being once shewn or admitted that this occurrence was an accident and that it took place during the employment of the deceased, he seems to have thought that sufficient unless the employers gave evidence to the contrary; in other words, he must have held that it shifted the burden of proof, and threw on the employers the onus of shewing that it did not arise out of the employment. In my opinion, that is a wrong view. The burden, and the whole burden, of proving the conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him. In my opinion, the evidence in the present case is quite consistent with the view that the accident happened in consequence of something which did not arise out of the employment. There seems to

C. A. 1903

POMFRET v. LANCASHIRE AND YORKSHIRE RAILWAY.

Collins M.R.

be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in *Wakelin* v. *London and South Western Ry. Co.* (1) No doubt in that case negligence was an essential factor, whereas here it is not; but in that case the evidence was quite consistent with there having been and not having been negligence, and on that ground the Court held that the onus of proof was not discharged; and in the present case the evidence is, in my view, quite consistent with the conclusion that the accident arose out of the employment, or with the contrary conclusion that it did not. I think therefore that the decision of the county court judge is wrong; but as it is possible that further evidence may be obtained, I think it desirable that the case should go back to him, so that, unfettered by what I think was misdirection, he may hear any further evidence that may be forthcoming.

STIRLING L.J. I am of the same opinion. The right to compensation only accrues where the workman has met with personal injury in an accident arising out of and in the course of his employment. The words "out of" are as essential as the words "in the course of"—a view which this Court has acted on in many cases; I need only mention *Smith* v. *Lancashire and Yorkshire Ry. Co.* (2) and *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (3) It seems to me from the language used by the learned judge, as it appears upon his notes, that he forgot or omitted to give effect to the very terms of the statute; he did not pay attention to the fact that the accident must be shewn to have arisen out of as well as in the course of the employment. I will give an illustration of my meaning. If, for example, a workman employed by the railway company, and travelling by train in the course of his employment, had opened the door of the carriage in order to get on to the footboard and an accident had happened to him in consequence, it clearly would not have arisen out of his employment, his sole duty at the time being to travel from

(1) 12 App. Cas. 41. (2) [1899] 1 Q. B. 141.
(3) [1902] 2 K. B. 178.

one station to another by a particular train. That being so, I think that the best course to adopt is to send the case back for further investigation. There was another person, the engine-driver Williams, who was in the carriage at the time, but was not called before the county court judge, and it is possible that his evidence might throw further light upon the circumstances which led to the accident. As this case is to go back to the county court judge, it is not desirable to discuss at the present time its particular circumstances, but I wish to guard myself from being supposed to have said that it is not competent to a judge, upon a particular state of facts being proved, to draw an inference of fact that an accident arose out of as well as in the course of the employment.

MATHEW L.J. I agree that it is better that this case should go back to the learned judge, but I confess that my view, although it is not a final view, is that there is abundant evidence to justify the conclusion to which he came. He has drawn the inference that the deceased did no more than an ordinary passenger in the train might do, and, speaking for myself, I cannot resist the conclusion that the accident which happened to him arose out of as well as in the course of his employment. No doubt the learned judge has told us his view of the law, and if that view is to be treated as being of universal application it might lead to the conclusion that it was sufficient to prove that the accident arose in the course of the employment without its being shewn that it arose out of it. In the particular case, I think he might possibly come to the conclusion that the language of the statute was abundantly satisfied by the facts given in evidence, and that in such a case no distinction ought to be drawn between the words "out of" and the words "in the course of." It is true that in a number of cases it may be said that the accident occurs "in the course of," but does not arise "out of" the employment; but such cases do not appear to me to be any guide in this particular case. Some evidence was given in the present case, and if the learned judge thought that the deceased man had done no more than an ordinary passenger might do, and that

C. A. 1903

POMFRET v. LANCASHIRE AND YORKSHIRE RAILWAY.

Mathew L.J.

the accident occurred while he was acting in that ordinary way, he ought to be protected. Nothing is more clear than the admission made at the hearing on the part of the company that the deceased was being employed by them when he was going back by train, and was performing his duty when he was going back, and that an accident occurred to him while going back. I should have thought that these admissions would in themselves have been sufficient; but as the learned judge may possibly have drawn an imperfect conclusion from the facts, I think that the case should go back to him.

Case remitted to county court judge.

The application was further heard by the county court judge on May 27, 1903, when Williams, the engine-driver, was called as a witness for the applicant. His evidence was as follows: The deceased was working as his fireman; when the passenger train came in they got into a third-class compartment, the train being on their left. The witness sat down just inside the door facing the engine, the witness Moulton being opposite to him. The deceased went to the other end of the compartment; he had a basket with him, which he put in the rack near the engine, the train being then on the move. The deceased had his back towards Williams and his face towards the door. Williams did not notice the window and did not see the deceased do anything else. About a minute after the train started, Williams heard a crash and the deceased had disappeared; this was about 300 yards out of the station. Williams believed that the window was open and the door shut on the half-catch. The county court judge, in giving judgment on June 30, 1903, said that he could draw no other inference than that the accident occurred when the deceased was acting as any ordinary passenger would do, and he found as a fact that the accident arose out of and in the course of the deceased's employment. The railway company appealed.

July 25. *C. A. Russell, K.C.*, and *Spencer Hogg*, for the railway company. The county court judge seems to have applied the maxim "Omnia præsumuntur rite esse acta" in

favour of the applicant; but that cannot be the proper test to apply, and it was not applied in the case of *Wakelin* v. *London and South Western Ry. Co.* (1) The evidence at the second hearing does not shew the cause of the accident, and the applicant has not discharged the burden which lay upon her of shewing that it arose out of the employment. The case of *Goodlet* v. *Caledonian Ry. Co.* (2), which was cited below, is not in point, for the workman was in that case killed while crossing the rails on the way back to his engine from a platform where he had been engaged in casual conversation with a fellow-servant; that case was analogous to *McNicholas* v. *Dawson.* (3) The present case falls within the principle of *Wakelin* v. *London and South Western Ry. Co.* (1), and the applicant has failed to discharge the burden of proof which was upon her.

J. R. Randolph, for the applicant, was not called upon.

COLLINS M.R. I adhere to what I said upon the previous occasion, when I explained, I hope clearly, that where the onus of proof is by law upon one of the parties to a legal proceeding, that party is bound to discharge it. But I think that the fresh evidence which has been given throws some new light upon the facts of the case. The case is, no doubt, very near the line, but I think, as the county court judge suggested, that there was enough evidence to justify him, had it been an ordinary action tried with a jury, in leaving the case to the jury, and that he would not have been justified in withdrawing it from them. The evidence of the additional witness does not contradict the evidence previously given, but supplements it, and is, I think, enough to carry the case over the line. It negatives the idea of any deliberate act on the part of the deceased man. Shortly put, it comes to this. The deceased had with him a basket, which he put on the rack as soon as he entered the carriage; the train began to move while he was doing so, and immediately afterwards the witness saw him standing by the door, but did not see him do anything else,

(1) 12 App. Cas. 41. (2) (1902) 4 F. 986.
(3) [1899] 1 Q. B. 773.

C. A. 1903

POMFRET v. LANCASHIRE AND YORKSHIRE RAILWAY.

Collins M.R.

and saw no more of him until he heard the crash and found that the deceased had fallen on to the line. We know also that the deceased was found lying not more than 300 yards from the starting-point of the train. The evidence rather suggests that while the deceased was still standing up and was putting his basket in the rack the train began to move, and as it travelled rather unsteadily at starting the deceased lost his balance and fell against the window in the upper part of the door, and so fell out of the train. At any rate, whether or not that is the true inference, I think that the evidence would have been fit evidence for consideration by a jury, and would have been evidence on which they might properly find a verdict in favour of the deceased man's representatives. It is not a similar case to *Wakelin* v. *London and South Western Ry. Co.* (1), where there was merely the naked fact that the body of the deceased was found lying on the line near a level crossing, and there was no presumption as to negligence one way or the other; in that case it was held, and I entirely agree with the decision, that the onus of establishing the fact that the man's death was caused by the negligent act of the defendants had not been discharged by the plaintiff, and that, therefore, she could not recover.

In the present case the county court judge has based his judgment upon his right to assume that everything had been properly done; he has relied upon the proposition "Omnia præsumuntur rite esse acta"; but I do not think that that is the correct view to take, or that there is any such presumption in such a case as that before us, for in *Wakelin* v. *London and South Western Ry. Co.* (1) the House of Lords declined to act upon the presumption that the deceased man had behaved with care. There being no such presumption as that suggested, the onus in the present case is upon the applicant to shew that the accident arose out of, as well as in the course of, the employment of the deceased. Now, however, that we have before us this additional evidence, I think that there are facts from which the tribunal trying the case may fairly draw the inference that the accident arose out of the employ-

(1) 12 App. Cas. 41.

ment, and, although the case is very near the line, we cannot interfere with the tribunal which has to determine the facts, if there is any evidence upon which the finding could be based. I think, therefore, that there was evidence to support the conclusion to which the county court judge came, and this appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The only question is whether the accident which caused the death arose out of, as well as in the course of, the employment, and I think there is now evidence fit for the consideration of a jury that it did so arise.

MATHEW L.J. I am of the same opinion. I think that there was clearly evidence fit to go to a jury that the accident arose out of the employment, and I can see no reason to doubt the conclusion arrived at by the county court judge as the judge of fact that the accident did so arise.

Appeal dismissed.

Solicitors for applicant: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for railway company: *Woodcock Ryland & Parker, for Moorhouse, Manchester.*

W. J. B.

C. A.

1903

March 27.

[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN THE CITY AND SOUTH LONDON RAILWAY COMPANY AND THE RECTOR AND CHURCHWARDENS OF THE UNITED PARISHES OF ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW.

Lands Clauses Act—Compensation—Severance and injuriously affecting Land—Site of a Church—Possibility of future Sale—Union of Benefices Act, 1860 (23 & 24 *Vict. c.* 142)—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

By a private Act incorporating the Lands Clauses Act, 1845, except where expressly varied by the special Act, a railway company were authorized to take the site of a church and land connected therewith in London. By a subsequent private Act of the same company it was provided that the company should not take any part of the church, but might acquire any other part of the property, and an easement or right of using the subsoil under the church, including such part of the crypt and foundations as the company might require. Provision was made for the temporary use of the structure of the church during construction of the works, and, in case of such user before payment of compensation, possession might be obtained under the provisions of s. 85 of the Lands Clauses Consolidation Act, 1845. It was also provided that the company should make good any damage caused to the structure of the church at any time after the completion of the railway in consequence of the construction, user, or want of repair thereof. The amount of compensation to be paid by the company for the surface taken by them and for the subsoil and crypt and all other matters in difference were to be determined by an arbitrator. The company took the land, other than the site of the church, and constructed a station under the church. On an award of an arbitrator stated in the form of a special case:—

Held (affirming the judgment of Wright J.), that there being nothing in the special Act to exclude the operation of the Union of Benefices Act, 1860, and no inference that it was intended to exclude the operation of s. 63 of the Lands Clauses Act, 1845, arising either by intendment or by the express inclusion of s. 85 of that Act, and the easement being specifically mentioned as the subject of compensation, the arbitrator was entitled to assess compensation under s. 63 of the Lands Clauses Consolidation Act, 1845, in respect of severance or the injurious affecting of other lands, on the basis that although the lands not taken by the company were the

site of a church, they might at some future time cease to be so, and be available for building, and that he was at liberty to draw his own conclusions as to when that time would be likely to arrive.

APPEAL from a judgment of Wright J. on a special case stated by an arbitrator.

By the City and South London Railway Act, 1893 (56 & 57 Vict. c. ccvii.), which by s. 2 incorporated the Lands Clauses Acts, except where expressly varied by the special Act, the company were given powers for the compulsory purchase of lands, including the site of the church of St. Mary Woolnoth, and the lands adjoining and held therewith. By the City and South London Railway Act, 1896 (59 & 60 Vict. c. cclii.), the powers given by the former Act were extended for a further period. By s. 7 of this Act it was enacted that: "(*a*) notwithstanding anything contained in the Act of 1893, or shewn on the deposited plans, the company shall not, except as hereinafter provided, purchase or take any part of the church . . . . in the parish of St. Mary Woolnoth, but the company may purchase, take, and use, and the owners and other persons interested in the said property shall sell, the surface of such other part of the said property as the company may require for the purposes for which but for this section they might have purchased, taken, or used the said church, and an easement or right of using the subsoil under any part of the property of which the surface shall not be purchased, including such part of the crypt and foundation of the said church as the company may require for the purposes aforesaid." Clause (*b*) provided for temporary use of the structure of the church during construction. "(*c*) The amount of purchase-money or compensation to be paid by the company for the portion of so much of the surface as is not occupied by the church as shall be required by them, and for the subsoil and crypt and for temporary occupation of the church, and all other matters in difference" were to be referred to an arbitrator, with a proviso that in assessing compensation he was to take into consideration the additional liabilities and expenses entailed upon the company in constructing the railway without removing the church. "(*d*) The company shall at their own

C. A. 1903

CITY AND SOUTH LONDON RAILWAY AND ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, *In re.*

cost make good any damage or injury which may, during the construction of the railway and works, be caused to the structure of the said church or any part thereof, or at any time after the completion of the said railway and works, in consequence of the construction, use, or want of repair thereof." "(*c*) If the company desire to obtain possession of the church for the purpose of constructing their railway and works, before the amount to be paid to the owner as compensation shall have been determined by agreement or arbitration as herein provided, it shall be lawful for them to do so under the provisions of s. 85 of the Lands Clauses Consolidation Act, 1845." Sect. 8 provided for the payment of the purchase-money to the Paymaster-General to the credit of the Ecclesiastical Commissioners, to be applied in such manner as Parliament should thereafter determine, either on the application of the Commissioners or, on their default, of the rector and churchwardens, and in the event of the purchase-money being ascertained in accordance with the provisions of the Lands Clauses Act, 1845, no determination of the amount thereof was to be valid without the reasonable approval of the Commissioners.

The company gave notice to the rector and churchwardens that they required to purchase certain part of the surface lands and an easement or right of using the subsoil under the remainder of the lands, including therein the crypt and foundations of the church, and that they required the temporary use of the whole of the land, and that they were willing to treat for the purchase of the lands and hereditaments and the subsoil, including the crypt and foundations so required. At a later date, and before the compensation to be paid by the company had been determined, they took possession of the lands required by them. A notice of claim was served by the rector and churchwardens on the company, and by deed the parties appointed an arbitrator to determine the amount of compensation to be paid. The arbitrator made his award in the form of a special case.

The questions for the opinion of the Court were stated by the arbitrator as follows:—

"(1.) Whether upon the facts herein stated the purchase-

money or compensation to be paid by the company (A) for the portion of so much of the surface as is not occupied by the site of the church as has been taken by the company, (B) for the subsoil and crypt of the church, (C) for damage (if any) sustained by reason of the severing of the lands taken from the other lands of the rector and churchwardens, or otherwise injuriously affecting such other lands by the exercise of the powers of the Acts, and (D) for the temporary occupation of the church, is to be assessed upon the basis—

"(α) that all the lands taken are the site of the church of St. Mary Woolnoth, and that the same can never be used for any other purpose; or upon the basis

"(β) that although the lands taken are at present the site of a church, they might under some Act of Parliament, or under a scheme under the Union of Benefices Act, 1860, or otherwise (but for the passing of the City and South London Railway Act, 1896) at some future time have ceased to be the site of a church, and have become available for building, and that I am at liberty to draw my own conclusions as to when that time (if any) would have been likely to arrive; or upon the basis

"(γ) that the site of the church and the lands not occupied by the site of the church respectively can be made immediately available for the erection of buildings other than a church.

"(2.) Whether the site of the church can still be dealt with under the provisions of the Union of Benefices Act, 1860, subject to the right of the company under their Act of 1896, and a purchaser of the site will have a right of support in respect of any buildings which he may erect thereon.

"(3.) Whether the company will be under the same obligation to make good any damage or injury which may be caused to the structure of any such buildings as last aforesaid, in consequence of the construction, use, or want of repair of the railway and works, as is imposed upon the company by s. 7 (*d*) of the Act of 1896 after the completion of the railway and

C. A. 1903

CITY AND SOUTH LONDON RAILWAY AND ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, *In re.*

works, in case of such damage or injury caused to the structure of the church."

The award then stated the alternative amounts found by the arbitrator.

The case was argued before Wright J., who decided that severance was an essential element in estimating the amount of compensation to be paid, and that the basis (β) was the one that the arbitrator should adopt, and that it was for him to take into consideration the circumstances tending to shew at what time the site would be likely to become available for building, and that he was at liberty to draw his own conclusions as to when that time would be likely to arrive.

The railway company appealed.

Balfour Browne, K.C., and *J. Eldon Bankes, K.C.* (with them *W. H. Ames*), for the railway company. Under the company's first Act they were empowered to take the site of the church, but the second Act prevented them from doing so. The church is to remain, and the company is bound after the completion of the works to make good any damage arising from time to time from their works.

The whole object of the Legislature was that the church should remain as a church, and it cannot be treated as an available site for building because, under these circumstances, the Union of Benefices Act, 1860, can have no application. The removal of the church would require an Act of Parliament, and the contingency of such an Act being passed is a matter which the arbitrator is not entitled to take into account, for it would be impossible for him to say when, if at all, such an Act would be passed. If the church is to remain, no question of severance arises. In *Reg.* v. *Lord Mayor of London* (1) Blackburn J. said that, in construing Acts of Parliament passed since the Lands Clauses Consolidation Act, it ought to be taken that the Legislature intended to follow the code laid down by that Act except where, by the express language of the special Act, or by necessary intendment from its provisions, it appeared that it was intended to depart from that code, and

(1) (1867) L. R. 2 Q. B. 292, at p. 295.

substitute something else. This intention does appear in the company's Acts.

The compensation payable by the company is for the matters specified, and s. 85 of the Lands Clauses Act is specifically included. The inference to be drawn from the Acts is that s. 63 of the Lands Clauses Act, 1845, which does not apply to an easement which is not "lands" within the section, is excluded. A variation in the special Act shewing that the provisions of s. 63 of the Lands Clauses Act are inapplicable has the same effect as if that were expressly stated: *Metropolitan District Railway* v. *Sharpe*. (1)

[They cited *Stebbing* v. *Metropolitan Board of Works*. (2)]

Boyle, K.C., and *H. Newson*, for the rector and churchwardens. There is nothing in the company's Act of 1896 which says that the church is always to remain, and nothing to exclude the operation of the Union of Benefices Act, 1860. The rights under that Act continue, and may take effect at any time. The possibility of their being acted on is a matter that the arbitrator may take into consideration in assessing compensation, and it is for him to consider probabilities. Sect. 2 of the company's Act of 1893 disposes of the suggestion that any variation from the provisions of the Lands Clauses Act can be implied, for it incorporates that Act in its entirety, except where expressly varied by the special Act. Neither by necessary intendment nor by the express mention of s. 85 of the Lands Clauses Act is s. 63 of that Act excluded from the special Acts. *Stebbing* v. *Metropolitan Board of Works* (2) related to the sale of a churchyard which, by s. 17 of the Union of Benefices Act, 1860, is expressly excluded from the operation of the Act. Prospective value is clearly the subject of compensation: *Reg.* v. *Brown* (3); and it is for the arbitrator to assess the amount.

Dibdin, K.C. (with him *Joseph Shaw*), for the Ecclesiastical Commissioners. No different considerations arise in this case from those that arise in the case of an individual owner. All rights to this property are vested in the rector and church-

(1) (1880) 5 App. Cas. 425, at p. 441.

(2) (1870) L. R. 6 Q. B. 37.

(3) (1867) L. R. 2 Q. B. 630.

C. A. 1903

CITY AND SOUTH LONDON RAILWAY AND ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, *In re.*

wardens and the Ecclesiastical Commissioners. The church might at any time be removed under the Union of Benefices Act, and those interested in the land would be freed from the obligation they are now under to keep up the church. They are therefore entitled to the commercial value of the land, estimated on the possibility of the removal of the restriction on its user: *Morgan* v. *North Western Railway*. (1) In *Hilcoat* v. *Archbishop of Canterbury* (2) Wilde C.B. pointed out the distinction between the position of an owner who has appropriated property to ecclesiastical or secular purposes and sacrificed its pecuniary value, and his position when that object is withdrawn and the property devoted against his will to secular purposes connected with pecuniary profit, and said that in the latter case it was not consistent with justice to estimate the value to the owner upon the footing of the irrevocable appropriation to these spiritual purposes. The taking of the land under the church, if it is treated as the acquisition of an easement, is made the express subject of compensation, and the provisions of the Lands Clauses Act are applied. At any rate, it is a hereditament, and as such is "land" within s. 63 of that Act: *Hill* v. *Midland Railway*. (3) [He cited also *Great Western Railway* v. *Swindon and Cheltenham Railway*. (4)]

Dibdin, K.C., and *H. Sutton*, appeared for the Attorney-General.

J. Eldon Bankes, K.C., in reply.

VAUGHAN WILLIAMS L.J. I think that the decision of my brother Wright should be affirmed. The questions raised by the special case are simple, and it should not take long to dispose of them. The first question we have to answer is whether the basis of compensation described by the arbitrator as (β) is that on which the case before him should be dealt with. In my opinion it is. Assuming that to be so, the only other question is whether damage for severance ought to be

(1) [1896] 2 Q. B. 469.
(2) (1850) 10 C. B. 327, at p. 347.
(3) (1882) 21 Ch. D. 143.
(4) (1882) 22 Ch. D. 677; (1884) 9 App. Cas. 787.

included. In my opinion the company are liable to pay compensation for severance.

Having stated the conclusions at which I have arrived, I proceed to give my reasons for them. In fact the whole argument on behalf of the railway company has been on the basis described as (*a*) in the case, namely, that all the lands taken are the site of the church, and can never be used for any other purpose. In my judgment it is not true that all the lands taken can never be used for any other purpose than that of the site of a church. It is plain that, apart from the special provisions in the railway company's Act, the effect of the Union of Benefices Act, 1860, upon church property in the metropolis is such that, upon a scheme being properly initiated in accordance with the provisions of s. 17, the land could be sold, and there would be no restriction to prevent its being applied by the purchaser to building purposes. Counsel for the company were asked in the course of the argument if they could point out anything which excluded the operation of the Union of Benefices Act, and it was admitted that, looking in the company's Act for words that would have that effect, no such words were to be found. It was said, however, that there are to be found in the special Act provisions indicating that the church is to stand on the land in perpetuity, and that, the church so standing and being used, it would be impossible to apply the provisions of the Union of Benefices Act. If that were correct it would be an answer to the claim; but I do not find any such provisions. The company are only entitled to acquire the adjacent land and the subsoil; but it does not follow that because the Legislature would not allow the church to be pulled down to enable the company to carry out the scheme of their bill, that Parliament intended to exclude legislation, which might under certain circumstance enable the church to be disposed of. In these circumstances there is no ground for saying that the land might not hereafter be sold under the Union of Benefices Act, and the arbitrator suggests a course which is right when he suggests that compensation may be assessed upon the basis that, although the lands are at present the site of a church, they

C. A. 1903

CITY AND SOUTH LONDON RAILWAY AND ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, *In re.*

Vaughan Williams L.J.

might cease to be so and become available for building, and that he is at liberty to draw his own conclusions as to when that time, if it ever arrives, will be likely to do so.

I want to say a word about the case of *Stebbing* v. *Metropolitan Board of Works* (1), though it is really not necessary to do so having regard to the adoption of the basis for compensation that I have suggested to be the right one. With all respect for the learned judges who decided that case, I myself prefer the decision in *Hilcoat* v. *Archbishop of Canterbury*. (2) It is plain that the judges in the first-mentioned case were not agreed as to the principle on which it should be decided. Cockburn C.J. put great stress upon the fact that it was a case of public property being transferred to another public body, while Hannen J. declined to recognise that as a material fact. The true principle seems to me to be laid down by Wilde C.J. in *Hilcoat* v. *Archbishop of Canterbury* (2), and I prefer that decision so far as it is inconsistent with that given by the Court of Queen's Bench. I say so far as it is inconsistent with it, because in my judgment the decision we are giving to-day is not inconsistent with that of Lush J. in *Stebbing* v. *Metropolitan Board of Works*. (1) The passage of the judgment of Wilde C.J. to which I wish to refer is at p. 347 of the report, and is as follows: "By the appropriation of property to ecclesiastical or spiritual purposes, the owner voluntarily sacrifices the pecuniary value of the property so appropriated: but he makes that sacrifice to obtain an object which he estimates of greater value than pecuniary value. But, when that object is entirely withdrawn from him, by the application of the property, against his will, to secular uses, and those uses connected with pecuniary profit—it does not seem consistent with justice to estimate the value to the owner upon the footing of its irrevocable appropriation to those spiritual purposes from which it has been already withdrawn." It seems to me that this is so, not only with reference to ecclesiastical property, but with reference to every sort of property which is devoted to such purposes that it cannot be sold, and a railway company

(1) L. R. 6 Q. B. 37. (2) 10 C. B. 327.

get power to acquire the land as if there were no such restriction, and then ask that the price should be assessed on the basis that the property is still subject to the restriction. I recognise the difficulty that may arise in the case of a temporary owner like a rector with a limited interest; but that is got over in the present case by the interposition of the Ecclesiastical Commissioners. When there is an Act of Parliament which says that property may be dealt with independently of its dedication to a special purpose, it seems to me that the payment in respect of its value ought to be estimated independently of the dedication, which has no longer any operation by, in effect, its repeal by the special Act.

The only other matter as to which it is necessary to say anything is the easement. With regard to that, I accept as conclusive the authority of the decision in *Great Western Railway* v. *Swindon and Cheltenham Railway* (1), and I refer in particular to the judgment of Lord Watson at p. 800 of the report, which ends on p. 801 with the words, "When that Act"—that is the Lands Clauses Act, 1845—"is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought by virtue of their new context to be construed so as to include and apply to hereditaments which are not corporeal." I think that in this case the context of the special Act, taking it as a whole, is such that it is plain the Act authorized the railway company to buy, as if it were land, this incorporeal right, and it follows from the decision that I have just cited that in s. 63, as well as in other sections, inclusive of s. 85, the word "lands" must be read in this case as including incorporeal hereditaments—that is to say, as including easements. It was argued that s. 63 was excluded because s. 85 was expressly mentioned in the company's second Act; but the answer to that suggestion is that the power given by s. 7 (*e*) of that Act to obtain, before payment of compensation, possession of the church extended to a wider subject-matter than is included in s. 85. The purchase by the railway company did not include the site of the church, and the right

(1) 9 App. Cas. 787.

C. A. 1903

CITY AND SOUTH LONDON RAILWAY AND ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW, *In re.*

of entry was for the purpose of constructing the works, and necessitated the express incorporation of s. 85 and its application to that right of entry. I think that the judgment of Wright J. ought to be affirmed, and that this appeal must be dismissed.

STIRLING L.J. I am of the same opinion. I agree in thinking that there is nothing in the company's special Act that excludes the operation of the Union of Benefices Act, 1860. It follows that the arbitrator is bound to take into consideration the fact that the land which was taken by the railway company might, under a scheme properly set on foot and carried out under the Union of Benefices Act, 1860, cease to be the site of a church, and so doing he must arrive at his own conclusion as to when that time would be likely to arrive. That being so, the proper basis for compensation is that denoted by (β) in his award. I also think that the arbitrator was right in awarding compensation for severance. It follows from what I have already said that he was bound to deal with the question of severance on the same basis—that at some future time it was possible that the church might be removed, and that the land would become available for other purposes, such as building, and might be sold, subject, of course, to any rights acquired by the railway company in pursuance of the company's special Act. In the case of a sale taking place hereafter, the owners of the site will find themselves hampered by the right of the company to use the subsoil. Why should there be no compensation for this? It is said there should be none because s. 63 of the Lands Clauses Act is excluded by the terms of the company's Act; but I am unable to see anything either by way of necessary intendment or in the special reference to s. 85 which excludes the operation of s. 63, especially having regard to the enactment, in the first of the company's Acts, that all the provisions of the Lands Clauses Act are to apply except where expressly varied. I also think that, in this case, the expression "lands" includes a specific easement, which the company were authorized to acquire under their special Act. I think, therefore, that s. 63 is

incorporated in the special Act, and is applicable to this case, and that consequently the judgment of Wright J. must be supported, and the appeal dismissed.

MATHEW L.J. I agree, for the reasons given by my learned brothers, that the learned judge was right as to the mode and basis upon which the compensation was arrived at by the arbitrator under (*β*), and that the potential value of the land might be taken into account. Complaint is made that the arbitrator was wrong in dealing with severance, as he has unquestionably done, because he took into account "damage sustained by reason of the severing of the lands taken from the other lands of the rector and churchwardens, or otherwise injuriously affecting such other lands by the exercise of the powers of the said Acts." On examining the section under which compensation is to be assessed, namely, s. 7 (*c*) of the second special Act, the provision is that "the amount of purchase-money or compensation to be paid by the company for the portion of so much of the surface as is not occupied by the church" shall be ascertained by the arbitrator. Compensation for what? Turning to the Lands Clauses Act, 1845, we find that under s. 63 compensation is to be awarded for severance or injuriously affecting land. The effort to eliminate s. 63, which alone makes the provision that I have read intelligible, seems to me to fail. The clause, s. 7 (*c*), ends thus: "Provided that the arbitrator to be so appointed shall, in assessing the amount to be paid by the company as purchase-money or compensation as aforesaid, take into consideration the additional liabilities and expenses entailed upon the company in constructing the railway and works." It would, therefore, appear that the compensation is the ordinary one, to be diminished in the particular case under that special provision.

I am clearly of opinion that the judgment of Wright J. ought to be affirmed.

Appeal dismissed.

Solicitors for appellants: *Donald McMillan & Mott.*
Solicitors for respondents: *Phillips, Son & Thompson.*

A. M.

C. A.
1903
July 13, 14, 15; *Aug.* 11.

[IN THE COURT OF APPEAL.]

KRELL *v.* HENRY.

Contract—Impossibility of Performance—Implied Condition—Necessary Inference—Surrounding Circumstances—Substance of Contract — Coronation Procession—Inference that Procession would pass.

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the coronation processions, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent :—

Held (affirming the decision of Darling J.), from necessary inferences drawn from surrounding circumstances, recognised by both contracting parties, that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract.

Taylor v. *Caldwell*, (1863) 3 B. & S. 826, discussed and applied.

Appeal from a decision of Darling J.

The plaintiff, Paul Krell, sued the defendant, C. S. Henry, for 50*l.*, being the balance of a sum of 75*l.*, for which the defendant had agreed to hire a flat at 56A, Pall Mall on the days of June 26 and 27, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty. The defendant denied his liability, and counterclaimed for the return of the sum of 25*l.*, which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.

The facts, which were not disputed, were as follows. The plaintiff on leaving the country in March, 1902, left instruc-

tions with his solicitor to let his suite of chambers at 56A, Pall Mall on such terms and for such period (not exceeding six months) as he thought proper. On June 17, 1902, the defendant noticed an announcement in the windows of the plaintiff's flat to the effect that windows to view the coronation processions were to be let. The defendant interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the processions could be obtained from the premises, and he eventually agreed with the housekeeper to take the suite for the two days in question for a sum of 75*l.*

On June 20 the defendant wrote the following letter to the plaintiff's solicitor:—

"I am in receipt of yours of the 18th instant, inclosing form of agreement for the suite of chambers on the third floor at 56A, Pall Mall, which I have agreed to take for the two days, the 26th and 27th instant, for the sum of 75*l.* For reasons given you I cannot enter into the agreement, but as arranged over the telephone I inclose herewith cheque for 25*l.* as deposit, and will thank you to confirm to me that I shall have the entire use of these rooms during the days (not the nights) of the 26th and 27th instant. You may rely that every care will be taken of the premises and their contents. On the 24th inst. I will pay the balance, viz., 50*l.*, to complete the 75*l.* agreed upon."

On the same day the defendant received the following reply from the plaintiff's solicitor:—

"I am in receipt of your letter of to-day's date inclosing cheque for 25*l.* deposit on your agreeing to take Mr. Krell's chambers on the third floor at 56A, Pall Mall for the two days, the 26th and 27th June, and I confirm the agreement that you are to have the entire use of these rooms during the days (but not the nights), the balance, 50*l.*, to be paid to me on Tuesday next the 24th instant."

The processions not having taken place on the days originally appointed, namely, June 26 and 27, the defendant declined to pay the balance of 50*l.* alleged to be due from him under the contract in writing of June 20 constituted by the above two letters. Hence the present action.

C. A. 1903

KRELL v. HENRY

Darling J., on August 11, 1902, held, upon the authority of *Taylor* v. *Caldwell* (1) and *The Moorcock* (2), that there was an implied condition in the contract that the procession should take place, and gave judgment for the defendant on the claim and counter-claim.

The plaintiff appealed.

Spencer Bower, *K.C.*, and *Holman Gregory*, for the plaintiff. In the contract nothing is said about the coronation procession, but it is admitted that both parties expected that there would be a procession, and that the price to be paid for the rooms was fixed with reference to the expected procession. Darling J. held that both the claim and the counter-claim were governed by *Taylor* v. *Caldwell* (1), and that there was an implied term in the contract that the procession should take place. It is submitted that the learned judge was wrong. If he was right, the result will be that in every case of this kind an unremunerated promisor will be in effect an insurer of the hopes and expectations of the promisee.

Taylor v. *Caldwell* (1) purports to be founded on two passages in the Digest. But other passages in the Digest are more directly in point, and shew that the implied condition is that there shall not be a physical extinction of the subject-matter of the contract.

[VAUGHAN WILLIAMS L.J. The English cases have extended the doctrine of the Digest.]

The limits of the extension are—(1.) the not coming into being of a thing which was not in existence at the date of the contract; (2.) the case of a thing, e.g., a ship, or a person in a contract for personal service, being incapacitated from doing the work intended. In order that the person who has contracted to pay the price should be excused from doing so, there must be (1.) no default on his part; (2.) either the physical extinction or the not coming into existence of the subject-matter of the contract; (3.) the performance of the contract must have been thereby rendered impossible.

In the present case there has been no default on the part of

(1) 3 B. & S. 826. (2) (1889) 14 P. D. 64.

the defendant. But there has been no physical extinction of the subject-matter, and the performance of the contract was quite possible. Rule 1, laid down in *Taylor* v. *Caldwell* (1), and not rule 3, is the rule that regulates this case. Rule 1 is directly in the plaintiff's favour, for here the contract was positive and absolute. In that case the music hall which was the subject of the contract had been burnt down, so that performance of the contract by either party had become impossible.

[VAUGHAN WILLIAMS L.J. referred to *Wright* v. *Hall.* (2)]

The cases which will be relied on for the defendant are all distinguishable from the present case.

Appleby v. *Myers* (3), *Boast* v. *Firth* (4), *Baily* v. *De Crespigny* (5), *Howell* v. *Coupland* (6), and *Nickoll* v. *Ashton* (7) are all distinguishable from the present case, in which two of the necessary elements do not exist.

There are a number of authorities in favour of the plaintiff, such as *Paradine* v. *Jane* (8); *Barker* v. *Hodgson* (9); *Marquis of Bute* v. *Thompson* (10); *Hills* v. *Sughrue* (11); *Brown* v. *Royal Insurance Co.* (12) These cases were all anterior to *Taylor* v. *Caldwell.* (13) There are other cases subsequent to *Taylor* v. *Caldwell* (13), such as *Kennedy* v. *Panama, &c., Mail Co.* (14); *In re Arthur* (15); *The Moorcock.* (16)

The real question is, What was the position of the parties on June 20, and what was the contract then entered into between them? The right possessed by the plaintiff on that day was the right of looking out of the window of the room, with the opportunity of seeing the procession from that window; the only sale to the defendant was of such right as the plaintiff had, and that was all that the plaintiff was parting with by the contract. There was, of course, the risk that the procession,

(1) 3 B. & S. at p. 833.
(2) (1858) E. B. & E. 746.
(3) (1867) L. R. 2 C. P. 651.
(4) (1868) L. R. 4 C. P. 1.
(5) (1869) L. R. 4 Q. B. 180.
(6) (1876) 1 Q. B. D. 258.
(7) [1901] 2 K. B. 126.
(8) (1646) Al. 26.
(9) (1814) 3 M. & S. 267; 15 R. R. 485.
(10) (1844) 13 M. & W. 487.
(11) (1846) 15 M. & W. 253.
(12) (1859) 1 E. & E. 853.
(13) 3 B. & S. 826.
(14) (1867) L. R. 2 Q. B. 580.
(15) (1880) 14 Ch. D. 603.
(16) 14 P. D. 64.

C. A. 1903

KRELL v. HENRY.

the anticipation of which gave the room a marketable value, might, from some cause or other, never take place; but that risk passed to the defendant by the contract. On entering into the contract with the defendant the plaintiff put it out of his power to let the room to any one else: he passed the right and the risk at the same time. No implied condition can be imported into the contract that the object of it shall be attained. There can be no implied condition that the defendant shall be placed in the actual position of seeing the procession. This case is closely analogous to that of *London Founders' Association, Limited* v. *Clarke* (1), where it was held that in a contract for the sale of shares in a company there was no implied covenant that the purchaser should be put into the status of a shareholder by registration. So in *Turner* v. *Goldsmith* (2), where the defendant contracted to employ the plaintiff for a fixed term as agent in a business which he, the defendant, ultimately abandoned before the expiration of the term, it was held that there was no implied condition for the continued existence of the business, and accordingly the plaintiff was held entitled to damages for breach of contract. And that was so although part of the res had perished; here no part of the res had perished. The rule is that the Court will not imply any condition in a contract except in case of absolute necessity: *Hamlyn* v. *Wood*. (3) No doubt, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7, where the specific goods, the subject of the contract, perish, the contract is gone; but this is not a case of that kind. And s. 14 enacts that, unless specified, no implied warranty or condition as to the quality or fitness of the goods supplied under a contract shall be imported. *Ashmore* v. *Cox* (4) is an authority in favour of the plaintiff, for it was there held that a buyer under a contract took the risk of the performance of the contract being rendered impossible by unforeseen circumstances.

Blakeley v. *Muller* (5) is also in the plaintiff's favour to the extent of the counter-claim.

(1) (1888) 20 Q. B. D. 576, 579, 580, 582.
(2) [1891] 1 Q. B. 544, 548, 551.
(3) [1891] 2 Q. B. 488, 491–2.
(4) [1899] 1 Q. B. 436, 441.
(5) (1903) 88 L. T. 90; 67 J. P. 51; post, p. 760 (note).

[*Duke, K.C.* The defendant abandons his counter-claim for 25*l.*, so that the sole question is as to his liability for the 50*l.*]

Upon the main question, then, it is submitted that both the decision in *Blakeley* v. *Muller* (1) and of Darling J. in the present case are opposed to the principle of *Taylor* v. *Caldwell*. (2) The contract here is absolute, and the defendant has not, as he might have done, guarded himself against the risk by suitable words.

Then, if it is said that this was a mere licence to use the room and therefore revocable as not being under seal, it has now been decided that even if such a licence is revoked an action is still maintainable for breach of contract: *Kerrison* v. *Smith*. (3)

In conclusion it is submitted that the Court cannot imply an express condition that the procession should pass. Nothing should be implied beyond what was necessary to give to the contract that efficacy which the parties intended at the time. There is no such necessity here; in fact, the inference is the other way, for money was paid before the days specified; which shews that the passing of the procession did not really constitute the basis of the contract, except in a popular sense. The truth is that each party had an expectation, no doubt; but the position is simply this: one says, "Will you take the room?" and the other says, "Yes." That is all. The contract did nothing more than give the defendant the opportunity of seeing whatever might be going on upon the days mentioned.

Duke, K.C., and *Ricardo*, for the defendant. The question is, What was the bargain? The defendant contends that it was a bargain with an implied condition that the premises taken were premises in front of which a certain act of State would take place by Royal Proclamation. A particular character was thus impressed upon the premises; and when that character ceased to be impressed upon them the contract was at an end. It is through nobody's fault, but through an unforeseen misfortune that the premises lose that character. The price agreed to be paid must be regarded: it is equivalent to

(1) 88 L. T. 90; 67 J. P. 51. (2) 3 B. & S. 826.
(3) [1897] 2 Q. B. 445.

C. A. 1903

KRELL v. HENRY.

many thousands a year. What explanation can be given of that, except that it was agreed to be paid for the purpose of enabling the defendant to see the procession? It was the absolute assumption of both parties when entering into the contract that the procession would pass.

The principle of *Taylor* v. *Caldwell* (1)—namely, that a contract for the sale of a particular thing must not be construed as a positive contract, but as subject to an implied condition that, when the time comes for fulfilment, the specified thing continues to exist—exactly applies. The certainty of the coronation and consequent procession taking place was the basis of this contract. Both parties bargained upon the happening of a certain event the occurrence of which gave the premises a special character with a corresponding value to the defendant; but as the condition failed the premises lost their adventitious value. There has been such a change in the character of the premises which the plaintiff agreed the defendant should occupy as to deprive them of their value. When the premises become unfit for the purpose for which they were taken the bargain is off: *Taylor* v. *Caldwell* (2), the principle of which case was adopted by the Court of Appeal in *Nickoll* v. *Ashton*. (3) What was in contemplation here was not that the defendant should merely go and sit in the room, but that he should see a procession which both parties regarded as an inevitable event. There was an implied warranty or condition founded on the presumed intention of the parties, and upon reason: *The Moorcock*. (4) No doubt the observations of the Court in that case were addressed to a totally different subject-matter, but the principle laid down was exactly as stated in *Taylor* v. *Caldwell* (1) and *Nickoll* v. *Ashton*. (5) In *Hamlyn* v. *Wood* (6) it was held that in a contract there must be a reasonable implication in order to give the transaction such efficacy as both parties intended it to have, and that without such implication the consideration would fail. In the case of a demise, collateral bargains do not arise; but here

(1) 3 B. & S. 826.
(2) 3 B. & S. at p. 832.
(3) [1901] 2 K. B. 126, 137.
(4) 14 P. D. 64, 68.
(5) [1901] 2 K. B. 126.
(6) [1891] 2 Q. B. 488.

there is an agreement, and what has to be done is to ascertain the meaning and intention the parties had in entering into it.

[STIRLING L.J. In *Appleby* v. *Myers* (1) there was a contract to supply certain machinery to a building, but before the completion of the contract the building was burnt down; and it was held that both parties were excused from performance of the contract.]

In that case the contract had been partly performed; but the defendant's case is stronger than that. When, as here, the contract is wholly executory and the subject-matter fails, the contract is at an end.

[STIRLING L.J. In *Baily* v. *De Crespigny* (2), where the performance of a covenant was rendered impossible by an Act of Parliament, it was held that the covenantor was discharged.

VAUGHAN WILLIAMS L.J. In *Howell* v. *Coupland* (3) the contract was held to be subject to an implied condition that the parties should be excused if performance became impossible through the perishing of the subject-matter.]

That applies here: it is impossible for the plaintiff to give the defendant that which he bargained for, and, therefore, there is a total failure of consideration.

To sum up, the basis of the contract is that there would be a procession—that is to say, it is a contract based upon a certain thing coming into existence: there is a condition precedent that there shall be a procession. But for the mutual expectation of a procession upon the days mentioned there would have been no contract whatever. The basis of the contract was also the continuance of a thing in a certain condition; for on June 20 the rooms were capable of being described as a place from which to view a procession on two particular days; whereas when those days arrived the rooms were no longer capable of being so described.

Holman Gregory replied.

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J. read the following written judgment:—The real question in this case is the extent

(1) L. R. 2 C. P. 651. (2) L. R. 4 Q. B. 180. (3) 1 Q. B. D. 258.

C. A. 1903

KRELL v. HENRY.

Vaughan Williams L.J.

of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor* v. *Caldwell*. (1) That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with obligationes de certo corpore. Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton* (2) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expresssly

(1) 3 B. & S. 826. (2) [1901] 2 K. B. 126.

mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case? The contract is contained in two letters of June 20 which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, for the sum of 75*l.*, 25*l.* then paid, balance 50*l.* to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, shew that the plaintiff exhibited on his

C. A. 1903

KRELL v. HENRY.

Vaughan Williams L.J.

premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27. In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10*l*., both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had

no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the

C. A. 1903

KRELL v. HENRY.

Vaughan Williams L.J.

non-happening of the procession, to use the words of Sir James Hannen in *Baily* v. *De Crespigny* (1), was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both *Jackson* v. *Union Marine Insurance Co.* (2) and *Nickoll* v. *Ashton* (3) the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture: in the former case the carriage of the goods to effect which the charterparty was entered into; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the Court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in *The Moorcock* (4), and refused to be implied in *Hamlyn* v. *Wood*. (5) But *The Moorcock* (4) is of importance in the present case as shewing that whatever is the suggested implication—be it condition, as in this case, or warranty or representation—one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample

(1) L. R. 4 Q. B. 185.
(2) (1873) L. R. 8 C. P. 572.
(3) [1901] 2 K. B. 126.
(4) 14 P. D. 64.
(5) [1891] 2 Q. B. 488.

authority for this proposition. Thus in *Jackson* v. *Union Marine Insurance Co.* (1), in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture; and that was a case in which, as Bramwell B. points out in his judgment at p. 148, *Taylor* v. *Caldwell* (2) was a strong authority to support the conclusion arrived at in the judgment—that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of the contract but discharged the charterer, though he had such an excuse that no action would lie. And, again, in *Harris* v. *Dreesman* (3) the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the Court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again it was held in *Mumford* v. *Gething* (4) that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissible to shew in what capacity A. was to serve B. See also *Price* v. *Mouat.* (5) The rule seems to be that which is laid down in Taylor on Evidence, vol. ii. s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the

(1) L. R. 8 C. P. 572; (1874) 10 C. P. 125; 42 L. J. (C.P.) 284.
(2) 3 B. & S. 826.
(3) (1854) 23 L. J. (Ex.) 210.
(4) (1859) 7 C. B. (N.S.) 305.
(5) (1862) 11 C. B. (N.S.) 508.

C. A. 1903

KRELL v. HENRY.

Vaughan Williams L.J.

persons and things to which the instrument refers, must of necessity be received." And Lord Campbell in his judgment says: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." See per Campbell C.J., *Macdonald* v. *Longbottom*. (1) It seems to me that the language of Willes J. in *Lloyd* v. *Guibert* (2) points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of *Taylor* v. *Caldwell* (3) that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of *Taylor* v. *Caldwell* (3) ought to be applied. This disposes of the plaintiff's claim for 50*l*. unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25*l*. he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it. I have only to add that the facts of this case do not bring it within the principle laid down in *Stubbs* v. *Holywell Ry. Co.* (4); that in the case of contracts falling directly within the rule of

(1) (1859) 1 E. & E. 977, at p. 983.
(2) (1865) 35 L. J. (Q.B.) 74, 75.
(3) 3 B. & S. 826.
(4) (1867) L. R. 2 Ex. 311.

Taylor v. *Caldwell* (1) the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

ROMER L.J. With some doubt I have also come to the conclusion that this case is governed by the principle on which *Taylor* v. *Caldwell* (1) was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams L.J., and (as I gather) also arrived at by my brother Stirling. This being so, I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely.

STIRLING L.J. said he had had an opportunity of reading the judgment delivered by Vaughan Williams L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of *Taylor* v. *Caldwell*. (1)

Appeal dismissed.

Solicitors: *Cecil Bisgood*; *M. Grunebaum*.

NOTE.—For other cases arising out of the postponement of the coronation, see the next following case; *Elliott* v. *Crutchley*, ante, p. 476, and *Herne Bay Steam Boat Co.* v. *Hutton*, ante, p. 683.

(1) 3 B. & S. 826.

W. C. D.

C. A.
1903
Oct. 29.

[IN THE COURT OF APPEAL.]

THE CIVIL SERVICE CO-OPERATIVE SOCIETY, LIMITED *v.* THE GENERAL STEAM NAVIGATION COMPANY.

Costs—Discretion—Appeal—Trial by Judge without Jury—Order LXV., *r.* 1—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Contract—Construction—Rights of Parties when Performance of Contract has become impossible.*

By a charterparty dated March 22, 1902, the defendants agreed to let, and the plaintiffs agreed to hire, the defendants' steamer for the term of three days from the hour she was placed at the plaintiffs' disposal in London on the day preceding that of the naval review to be held at Spithead on the occasion of the King's coronation in June or July, 1902; the steamer was to take up passengers at London and Southampton, and proceed to Spithead, arriving in time for the review, and returning to London on the third day of the hiring; and the amount to be paid by the plaintiffs for the hire was a lump sum of 1500*l.*, payable "250*l.* on signing the charter, and the balance ten days before the date of the review." The usual exceptions from owners' liability in respect of perils of the seas, &c., were contained in the charterparty. The plaintiffs paid to the defendants 250*l.* on signing the charterparty, and the balance, 1250*l.*, on June 18, the review having in the meantime been fixed to take place on June 28. The review was, in consequence of the King's illness, postponed on June 25, and thereupon notice that the plaintiffs would not require the steamer was given by them to the defendants, and accordingly she was not placed at the plaintiffs' disposal. The defendants, before the postponement of the review, had incurred expenses amounting to 500*l.* in fitting out the steamer and in doing other things by way of part performance of the contract, or in order to enable them to perform it. The review was not held until the month of August, 1902, and the plaintiffs sued the defendants to recover the 1500*l.* as money paid on a consideration which had failed. At the trial before a judge alone, it appeared that there had been some negotiations for a settlement of the dispute, and the judge expressed his desire that the matter should be left to him to say what, under the circumstances and apart from the strict legal rights of the parties, should be done. The defendants would not agree to that course being taken, and they also declined to accept the judge's suggestion that they should be content to retain the amount of the expenses they had incurred and have their costs. In the result the judge gave judgment for the defendants, but ordered that each of the parties should bear their own costs:—

Held, on an appeal by the plaintiffs from the judgment for the

defendants, that the plaintiffs were not entitled to recover the money they had paid:

Held, also, on the defendants' appeal from the order that each of the parties should bear their own costs, that there were no materials upon which the judge could exercise his discretion by making that order, and, therefore, that the Court of Appeal had power to entertain the appeal and reverse his decision.

APPEAL by the plaintiffs, and cross-appeal by the defendants, from the judgment of Bigham J., given in a commercial cause tried without a jury.

The action was brought to recover a sum of 1500*l.* paid by the plaintiffs to the defendants upon a consideration alleged to have failed.

By a charterparty dated March 22, 1902, and made between the defendants and the plaintiffs, the defendants agreed to let, and the plaintiffs agreed to hire, the steamship *Hirondelle*, of which the defendants were owners, "for the term of three days from the hour she is placed at the charterers' disposal in London on the day preceding that of the naval review to be held at Spithead on the occasion of the coronation of His Majesty King Edward VII. in June or July, 1902."

The hour of departure from London was to be mutually agreed, but it was to be sufficiently early to permit of the steamer reaching her berth at Spithead at the time appointed by the naval authorities, after calling at Southampton to embark further passengers. The defendants undertook to make the necessary arrangements with the London and South Western Railway Company for the conveyance by rail of those passengers who might desire to embark at Southampton instead of London. After the review, should the charterers desire it, the steamer was to proceed through the lines of the fleet, and return to her berth to witness the illumination of the fleet in the evening. On the day following, should the charterers desire it and the weather and other circumstances permit, the steamer was to proceed for a cruise in the English Channel of such duration as would enable her to reach London to disembark passengers by about noon the following day. The defendants were to provide and pay for the provisions and wages of the crew and all working stores and bunker coal, and

C. A. 1903

CIVIL SERVICE CO-OPERATIVE SOCIETY v. GENERAL STEAM NAVIGATION COMPANY.

to provide a number of sea-going stewards, but these stewards were to be the servants of the plaintiffs and to be paid and fed by them. The owners were not to be responsible for any loss, damage, or injury to person or property arising from perils of the sea, or of rivers, or of navigation; nor for the act of God, the King's enemies, pirates, robbers, restraint of princes, rulers, and people, strikes, &c. The clause with respect to payment for the hiring was as follows: "The amount to be paid by the charterers for the hire of the steamer is 1500*l.* lump sum, payable 250*l.* on signing the charter, and the balance ten days before the date of the review."

The plaintiffs paid to the defendants 250*l.* on the signing of the charterparty, and the balance, 1250*l.*, on June 18, 1902, the review having in the meantime been fixed to take place on June 28. On June 25 a notice was issued by the Admiralty stating that in consequence of the King's illness the review would be postponed; and thereupon the plaintiffs wrote to the defendants that they (the plaintiffs) would not require the steamer, and she was accordingly not placed at their disposal. The review was not in fact held until August, and the plaintiffs brought this action for the return of the 1500*l.* The defendants had incurred expense in fitting the steamer for the intended employment; they had negotiated, though they did not complete, arrangements with the London and South Western Railway Company for the conveyance of passengers by rail; they had engaged the stewards, and they had done other things by way of part performance of their contract, or in order to enable them to perform it. The learned judge at the trial found that the amount which the defendants were out of pocket by reason of work done or money spent, either under the contract or in preparation for it, was 500*l.*, which sum included compensation for loss of time in finding other employment for the vessel.

It appeared at the trial that there had been negotiations between the plaintiffs and the defendants for a settlement of the dispute between them, and the learned judge expressed his desire that they should leave the matter to him to say what, in the circumstances and apart from the strict legal rights of the

parties, should be done. The defendants, however, would not agree to that course, and they also declined to accept his suggestion that they should be content to retain 500*l.* and have their costs. It was not suggested that they had behaved improperly either in the conduct of the action or otherwise.

Bigham J. gave judgment for the defendants, holding that, on the true construction of the charterparty, the obligation of the plaintiffs to pay became fixed as soon as the day was fixed for the naval review, and it was not within the contemplation of the parties that payment should be conditional on the review taking place in June or July; that the defendants did all that they had to do under the contract, except so far as they were excused by the plaintiffs' own act, and that they were therefore entitled in law to retain the 1500*l.*

He ordered that each of the parties should bear their own costs.

The plaintiffs appealed from the judgment for the defendants; and there was a cross-appeal by the defendants against so much of the judgment as ordered that they should bear their own costs.

On the plaintiffs' appeal:—

Bray, K.C., and *Eustace Hills*, for the plaintiffs. The consideration for the payment of 1500*l.* was the defendants' performance of their contract to let the steamer to the plaintiffs for three days on the occasion of the naval review in June or July, and that consideration wholly failed. The defendants never could perform their contract for hiring, because the contract for hiring never began; they are not, therefore, entitled to retain the 1500*l.* If that sum had not been paid, it is clear that the defendants could not have sued the plaintiffs for it: *Krell* v. *Henry*. (1) The holding of the review was the foundation of the contract. It is not the true construction of the contract that the defendants' obligation to pay arose as soon as the day of the review was fixed.

[LORD HALSBURY L.C. The judgment of the Exchequer

(1) Ante, p. 740.

C. A. 1903

CIVIL SERVICE CO-OPERATIVE SOCIETY v. GENERAL STEAM NAVIGATION COMPANY.

Chamber, delivered by Blackburn J. in *Appleby* v. *Myers* (1) seems to me, in principle, decisive of the case now before us.]

It is submitted that *Appleby* v. *Myers* (1) only decided that, the contract being to pay on the completion of the work, the plaintiff could not recover on a quantum meruit.

[They also referred to *Taylor* v. *Caldwell* (2), *Howell* v. *Coupland* (3), *Blakeley* v. *Muller & Co.* (4), and *Hobson* v. *Pattenden & Co.* (4)]

(1) (1867) L. R. 2 C. P. 651.

(2) (1863) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(3) (1876) 1 Q. B. D. 258.

(4) (1903) 88 L. T. 90.

Blakeley v. *Muller & Co.* and *Hobson* v. *Pattenden & Co.* were appeals from decisions of the judge of the Clerkenwell County Court and the judge of the Southwark County Court respectively, and were heard by a Divisional Court on January 20 and 26, 1903.

In *Blakeley* v. *Muller & Co.* the action was to recover fifteen guineas paid by the plaintiff to the defendants under the following circumstances:—

On May 23, 1902, the plaintiff's agent, having seen a plan of certain seats to view the coronation procession appointed to take place on June 27, which seats it was proposed to erect on the ground floor of a shop, paid the defendants fifteen guineas for three numbered seats. The seats were to be on a structure to be erected by the defendants, and the structure and seats were afterwards erected by them. The procession not having taken place in consequence of the King's illness, the plaintiff brought this action.

The county court judge gave judgment for the defendants, and the plaintiff appealed.

In *Hobson* v. *Pattenden & Co.* the facts raised substantially the same question. The plaintiff, who lived at Nottingham, saw a prospectus issued by the defendants relating to a stand to view the coronation procession. He came to London, saw the defendants' agent at the stand, and chose two seats for which he paid fourteen guineas. In an action to recover that sum the county court judge gave judgment for the defendants, and the plaintiff appealed.

Griffith Jones, for the plaintiff, and *C. C. Scott*, for the defendants, in *Blakeley* v. *Muller & Co.*

McCurdy, for the plaintiff, and *P. Rose Innes*, for the defendants, in *Hobson* v. *Pattenden & Co.*

LORD ALVERSTONE C.J. (after stating the facts). In each of these cases the contract was silent as to the procession not taking place. The parties no doubt contemplated that it would take place, and from one point of view its taking place was the basis of the contract. It was said that the decision in *Taylor* v. *Caldwell*, 3 B. & S. 826, is applicable in favour of the plaintiffs in these two actions. The decision there was that, where the performance of a contract becomes impossible from some cause for which neither party is responsible, and the party sued has not contracted or warranted that the event, the non-occurrence of which has caused the contract not to be capable of performance, should take place, then both

Scrutton, K.C., and *Maurice Hill*, for the defendants, were not heard on the plaintiffs' appeal.

On the defendants' appeal:—

Scrutton, K.C. (*Maurice Hill* with him). The learned judge

---

parties are relieved from the performance of the contract. I agree that *Taylor* v. *Caldwell* applies, but the consequence of that decision is that neither party here could have sued on the contract in respect of anything which was to be done under it after the procession had been abandoned. The defendants could not be compelled to go on and complete the construction of the seats, and the plaintiff had no right to go to the seats and use them, and if no money had then become due from the plaintiff under the contract, he could not be sued for the contract price. Counsel for the appellants seek to go further and say that, not only does the principle of *Taylor* v. *Caldwell* apply, but that the decision justifies these actions to recover back the money paid. I think the decision in *Appleby* v. *Myers*, L. R. 2 C. P. 651, is to the contrary; but, whether it be so or not, there is nothing in *Taylor* v. *Caldwell* to suggest that, where money has become due and has been paid under the contract, the party who has paid it can recover it back because the further performance of the contract has become impossible. Speaking for myself, I cannot imagine a more unjust application of the principle if it led to the result for which the appellants contend, because in one at least of the cases before us considerable expense must have been incurred in putting up the seats, and the loss would fall wholly upon the defendants. I think that each party must rest in the position in which he is found to be when the event occurs which makes the contract impossible of performance, unless there is something special in the terms of the contract which gives one or other of the parties a different right. I agree with a great part of my brother Darling's judgment in *Krell* v. *Henry*, 18 Times L. R. 823, but I do not agree with that part of it which held that the plaintiff was entitled to recover back the 15*l.* he had paid. The learned judge seems to have thought that *Taylor* v. *Caldwell* justified him in constructing for the parties the contract they would probably have made if they had contemplated the event which happened; but in my opinion it does not. I therefore think that our judgment should be for the defendants in both these appeals.

WILLS J. I am of the same opinion. The decisions in *Taylor* v. *Caldwell* and *Appleby* v. *Myers* both apply here, but they lead to the conclusion that the defendants are entitled to our judgment. The decision in *Appleby* v. *Myers* is correctly summarized in Leake on Contracts, 4th ed. p. 494, thus: "Where a contract was made for the erection of machinery upon the premises of one of the parties, to be paid for upon completion, and in the course of the work the premises were destroyed by fire, it was held that both parties were excused from further performance, and no liability accrued on either side." That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded ab initio. There is no authority to

C. A. 1903

CIVIL SERVICE CO-OPERATIVE SOCIETY v. GENERAL STEAM NAVIGATION COMPANY.

did not exercise a judicial discretion in depriving the defendants of their costs. There were no facts before him upon which he could make the order. Where a person comes to enforce his legal right, the Court, in the absence of any misconduct, omis-

warrant that contention, and I cannot think it is well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very difficult to construct such a contract for them. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been. In *Taylor* v. *Caldwell* there is some sort of suggestion that a contract might be constructed for the parties, and I do not say that, if the facts were clear enough, it could not be done; I only say that it is a very difficult thing to do. In *Nickoll & Knight* v. *Ashton, Edridge & Co.*, [1901] 2 K. B. 126, there seems to have been no difficulty in construing the contract as being subject to an implied condition that the contract to ship goods should be at an end if, at the time for its performance, the ship had ceased to exist as a ship fit for carrying cargo. I agree with the judgment of my Lord, and, for the reasons he has given, I am of opinion that the defendants ought to succeed.

CHANNELL J. I am of the same opinion. I agree with the judgments which have been delivered; but I will add a few words in the hope that they may be of use in disposing of other cases of this kind. It is obvious that where the parties to a contract have in fact contemplated the possibility of some event happening which will prevent the contract being performed, you may be able to spell out what they meant their position to be if that event did happen, and, therefore, what was the true contract. But in each of the cases now before us the parties did not contemplate at all the event which happened. In *Krell* v. *Henry* it does not appear whether there was any express contract as to when the money was payable. If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back, and it could be sued for. All *Taylor* v. *Caldwell* says is that the parties are to be excused from the performance of the contract, and *Appleby* v. *Myers* says from the further performance. It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that, when the procession was abandoned, the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charterparty where the freight is payable in advance, and the voyage is not completed, and the

sion, or neglect on his part (and none was suggested here), has no discretion to deprive him of his costs if he is successful: see *Cooper* v. *Whittingham* (1), judgment of Jessel M.R. Before the litigation commenced the defendants had made an offer of settlement which was not accepted; they were entitled at the trial to stand on their strict legal rights, and entitled as of right to their costs if they succeeded.

Eustace Hills (*Bray, K.C.*, with him), for the plaintiffs. A judge, trying a case without a jury, has an unlimited discretion as to costs. The discretion was extended by s. 5 of the Judicature Act, 1890 (53 & 54 Vict. c. 44), which gave a new jurisdiction. In exercising his discretion to deprive a successful party of his costs, the judge may take into consideration the conduct of the party outside the action: *Harnett* v. *Vyse* (2); and it may be that the judge here thought the defendants ought to have been more willing to agree to some reasonable settlement before the litigation began.

EARL OF HALSBURY L.C. In this case it appears to me that without overruling a very considerable body of authority we cannot disagree with Bigham J.'s decision on the main question, namely, that the defendants had a right to retain what they had been paid, and that the parties on either side were excused from any further performance of the contract. I think that his judgment in that respect is right, and that he has rightly construed the obligations of the parties. The general question has lately been brought before the Court of

---

freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back. Of course, if the contract for seats had been made subsequent to the abandonment of the procession, that would be different altogether. There the money could be recovered.

Appeals dismissed.

Plaintiff's solicitor in *Blakeley* v. *Muller & Co.*: *Newton G. Driver.*

Defendants' solicitors: *King, Wigg & Co.*

Plaintiff's solicitors in *Hobson* v. *Pattenden & Co.*: *Geare & Pease, for Martin & Son, Nottingham.*

Defendants' solicitor: *H. Hilbery.*

W. A.

(1) (1880) 15 Ch. D. 501, at p. 504.
(2) (1880) 5 Ex. D. 307.

C. A. 1903

CIVIL SERVICE CO-OPERATIVE SOCIETY v. GENERAL STEAM NAVIGATION COMPANY.

Earl of Halsbury L.C.

Appeal in *Krell* v. *Henry* (1) in such a manner, I think, that if we were to reverse the learned judge's decision in the case before us, we should in effect, though not perhaps in strictness, be reversing a decision at which this Court has already arrived. The question has also been before a Divisional Court in *Blakeley* v. *Muller* (2), and I entirely concur with the view taken by the Lord Chief Justice in that case. I observe that Channell J., referring to *Krell* v. *Henry* (1), said: "If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back, and it could be sued for. All *Taylor* v. *Caldwell* (3) says is that the parties are to be excused from the performance of the contract, and *Appleby* v. *Myers* (4) says from the further performance. It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that when the procession was abandoned the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like the case of a charter-party where the freight is payable in advance and the voyage is not completed, and the freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back. Of course, if the contract for seats had been made subsequently to the abandonment of the procession, that would be different altogether. There the money could be recovered." I concur with every word of that, and I think that, substituting "naval review" for "procession," every word is applicable to the case now before the Court. I am, therefore, of opinion that the plaintiffs' appeal against Bigham J.'s judgment must be dismissed.

There comes then the question which has been argued on

(1) Ante, p. 740.
(2) 88 L. T. 90; ante, p. 760 (note).
(3) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(4) L. R. 2 C. P. 651.

the defendants' appeal. It is an important question, and one which, in my opinion, this Court has power to entertain. No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned judge could exercise a discretion at all. The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Bigham J., and in the judgment of this Court, they are right; and it practically comes to this—that the learned judge has deprived the persons sued of what, primâ facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion. Under these circumstances I am of opinion that the cross-appeal must succeed, and that the defendants are entitled to their costs.

LORD ALVERSTONE C.J. I am of the same opinion. The Lord Chancellor has exactly expressed my view, and I need only add that I do not think that this Court could have decided the main question otherwise without overruling *Blakeley* v. *Muller & Co.* (1)

On the question of the defendants' costs, I may add that more than one case has laid down that s. 5 of the Judicature Act, 1890, did not alter the law with respect to the discretion of a judge as to costs, or with respect to the powers of the Court of Appeal in dealing with that discretion. Sect. 5 merely brought within the ambit of the discretion certain cases

(1) 88 L. T. 90.

C. A. 1903

CIVIL SERVICE CO-OPERATIVE SOCIETY v. GENERAL STEAM NAVIGATION COMPANY.

in which it had previously been considered doubtful whether costs were in the discretion of the judge. If it appears that a judge has not exercised his discretion, or has decided upon grounds which were not open to him, this Court can still deal with his decision. On this question *Granville* v. *Firth* (1) is in point. In that case a judge had deprived a successful defendant of his costs because he had pleaded the Gaming Act, and this Court reversed the decision.

COZENS-HARDY L.J. I concur, and have nothing to add.

Plaintiffs' appeal dismissed.
Defendants' cross-appeal allowed.

Solicitors for plaintiffs: *Nicholson, Patterson & Freeland.*
Solicitors for defendants: *William Batham & Son.*

(1) (1903) 19 Times L. R. 213.

W. A.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1903, will be as follows :—

In the First Series,
[1903] 1 Ch. [1903] 2 Ch.

In the Second Series,
[1903] 1 K. B. [1903] K. B. [1903] P.

In the Third Series,
[1903] A. C.

INDEX.

ACCEPTANCE—Time for—Purchase-money and compensation—Offer by promoters 189
See LANDS CLAUSES ACTS. 2.

ACCIDENT—Workmen's compensation—"Arising out of and in the course of the employment" - - - 718
See EMPLOYER AND WORKMAN. 1.

ACT OF BANKRUPTCY.
See under BANKRUPTCY.

ACTION—Cause of—Interference with legal right—Mines—"Stop-day" - 545
See TRADE UNION. 2.

ADMIRALTY.
See under SHIPPING.

ADULTERATION—*Practice—Time for Return of Summons—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2.

By s. 19, sub-s. 2, of the Sale of Food and Drugs Act, 1899, it is provided that "In any prosecution under the Sale of Food and Drugs Acts the summons . . . . shall not be made returnable in less time than fourteen days from the day on which it is served":—

Held, that fourteen clear days must elapse between the date of service and that of return. McQUEEN *v.* JACKSON - - Div. Ct. 163

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGREEMENT.
See under CONTRACT.

ALEHOUSES.
See under LICENSING ACTS.

ALTERNATIVE DEFENDANTS—Costs—Jurisdiction—"Good cause" - - 533
See PRACTICE. 2.

APPEAL.
See under PRACTICE.

APPROPRIATION—*Payment—Statute of Limitations—Option of Creditor to appropriate—Limit on Exercise of Option—Set-off—Solicitor and Client—Solicitor's Bill—Sum received on Account of Client.*

The executor of a deceased solicitor brought an action in 1902 to recover costs alleged to be due to his testator's estate from the defendant, of which a bill had been delivered to the defendant, together with a cash account, on December 2, 1899. The items of the bill extended over a period from 1878 to 1899, and, the Statute of Limitations being pleaded, the judge at the trial gave judgment for the defendant in respect of all items prior to 1893, as being statute-barred. He referred the rest of the bill to a master for taxation, and to take the cash account from 1893, directing that credit should be given to the defendant for all sums of money received by the plaintiff's testator for or on account of the defendant, in respect of, or which ought to be treated as reducing or discharging, the bill of costs so taxed. Upon taxation the defendant brought in a surcharge in respect of a sum of 66*l.*, which had been received by the plaintiff's testator, as the defendant's solicitor in an action brought by the defendant, in 1894, and not accounted for to the defendant. No cash account had been delivered by the plaintiff's testator to the defendant except the account of December 2, 1899, which, through an inadvertence, contained no entry of the said sum of 66*l.* The plaintiff claimed that this sum should be treated as appropriated to payment or satisfaction of items which had accrued due from the defendant to the plaintiff's testator prior to 1893:—

Held, that the said sum of 66*l.* could not be set off against the statute-barred items under the statutes of set-off; and that, assuming that the plaintiff's testator would have had a right to appropriate the said sum to these items, yet, there having been no such appropriation, it was not, having regard to the terms of the judgment of the learned judge at the trial, open to the plaintiff so to appropriate the said sum subse-

APPROPRIATION—*continued.*
quently to that judgment; and therefore that the surcharge in respect of the said sum of 66*l.* must be allowed. SMITH *v.* BETTY - **C. A. 317**

ARBITRATION—Arbitrators, Jurisdiction of—Party wall — Expense of raising — Building notice - - - **463**
See LONDON. 1.

ARRANGEMENT — Scheme of—Composition — Conditional releases - - **50**
See BANKRUPTCY. 3.

ARREST—Debtor—Forfeiture of bond—Form of bond - - - - **164**
See BANKRUPTCY. 1.

ASSIGNMENT — *Debt—Equitable Assignment—Assignment by Letters from Assignor to Debtor and to Assignee—Bankruptcy of Assignor before receipt of Letters.*

A firm of merchants in South America, being indebted to the plaintiff, consigned a quantity of ores to the defendants, the agents of the South American firm in England, and instructed them by letter to sell the ores and to pay to the plaintiff the balance of the proceeds remaining after payment of a specified sum to another creditor; they also wrote to the plaintiff advising him of what they had done. Before either of the letters arrived in England the firm in South America became bankrupts, and the syndic in the bankruptcy telegraphed instructions to the defendants which amounted to a revocation of the directions given in the letter of the consignors as to the disposal of the proceeds of the sale of the cargo:—

Held, that upon the posting of the letters in South America there was a binding equitable assignment of the balance of the proceeds to the plaintiff which remained unaffected by the supervening bankruptcy of the consignors. ALEXANDER *v.* STEINHARDT, WALKER & CO. **Bigham J. 208**

—— Fraudulent assignment—Insolvent trader—Transfer of his business and another's to company for shares and debentures
See BANKRUPTCY. **517**

—— Lease—Covenant, Breach of—Forfeiture
See LANDLORD AND TENANT. **304**

ATTACHMENT—Publication tending to prejudice fair trial—Jurisdiction of High Court to attach - - - - **432**
See CONTEMPT OF COURT.

AVERAGE—Special provision in charterparty as to general average—Foreign law **503**
See INSURANCE, MARINE. 1.

BANK—Income tax—Purchase of business of another bank - - - **249**
See REVENUE. 3.

BANKER—Cheque.
See under CHEQUE.

BANKRUPTCY—*Arrest of Debtor—Bond to enforce Debtor's Attendance for Examination—Default of Debtor—Forfeiture of Bond—Whether Crown or Creditors entitled to Proceeds of Bond—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 25 —*Form of Bond.*

Where a debtor, who has been arrested under s. 25 of the Bankruptcy Act, 1883, for failing to attend his examination, gives a bond with sureties to obtain his release from prison, the proceeds of the bond, if it is subsequently forfeited, will go as a general rule, not to the Crown, but to the creditors, subject to any order the Court may make in any special case.

In future the bond is to be given to the senior registrar in bankruptcy for the time being. *In re* GORDON. *In re* SALMOND **Wright J. 164**

2. —— *Bankruptcy Notice — Set-off—Mutual Credits — Judgment Debt — Limited Company—Winding-up—Shareholder—Calls, Action for—Application to set aside Bankruptcy Notice—Set-off to be enforceable at time of hearing Application —Bankruptcy—Discharge of Debt by Set-off—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*); *s.* 38.

On an application by a judgment debtor to set aside a bankruptcy notice on the ground that he has a set-off against the judgment debt within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883—which enacts that a debtor commits an act of bankruptcy if he does not either comply with a bankruptcy notice demanding payment of a judgment debt, "or satisfy the Court that he has a . . . . set-off . . . . which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained"—he must satisfy the Court that he has, not merely an inchoate right of set-off which may, in the event of bankruptcy, ripen into an effective set-off under s. 38, but an effective set-off existing at the time the application is heard, that is, a set-off of a debt then capable of being enforced by action.

Thus, where the liquidator of a limited company in liquidation under a supervision order has obtained judgment in an action against a shareholder for unpaid calls, the judgment debtor cannot, upon an application by him to set aside a bankruptcy notice for payment of the judgment debt, claim to set off a debt alleged to have become due to him from the company prior to the liquidation; for, until after a receiving order has been made against him, he cannot set off against his unpaid calls the debt due to him from the company: see *Grissel's Case*, (1866) L. R. 1 Ch. 528.

Per Romer L.J.: A bankruptcy notice issued in respect of a judgment debt is not of necessity bad because, if bankruptcy ensues, the debt will be discharged by a set-off. *In re* G. E. B., A DEBTOR - - - - - **C. A. 340**

3. —— *Composition—Scheme of Arrangement —Withdrawals by Creditors—Releases by Majority of Creditors—Conditional Releases — Escrows—Composition payable to Minority of Creditors—Approval of Court — Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

A debtor against whom a receiving order had been made submitted for the approval of the Court under s. 3 of the Bankruptcy Act, 1890, a proposed composition scheme consisting partly of releases which had been given him by two-thirds of his creditors of their debts under private arrangements made with them by him-

BANKRUPTCY—*continued.*

self, and partly of an intended payment of a composition of 7*s.* 6*d.* in the pound to the remaining one-third. The particular circumstances under which the releasing creditors had agreed to release their debts were not explained to the Court, and the releases themselves were not absolute in terms, but stipulated that if the proposed composition of 7*s.* 6*d.* in the pound should not be approved by the Court, or the receiving order not rescinded, the releases "shall have no force or operation":—

Held, that, having regard to the form of the releases and to the fact that the circumstances under which they had been obtained had not been submitted to the consideration of the Court as part of the scheme, the scheme was not one which the Court could approve.

In re E. A. B., [1902] 1 K. B. 457, explained and distinguished.

The observations on that case in *Re Baines*, (1902) 86 L. T. (N.S.) 691, disapproved. *In re* PILLING. *Ex parte* BOARD OF TRADE **C. A. 50**

4. —— *Fraudulent Assignment—Act of Bankruptcy—Notice to Company—Subsequent Transferees of Debentures—Purchasers for Value without Notice—Title of Trustee in Bankruptcy—Insolvent Trader—Transfer of his Business and another's to Company for Shares and Debentures—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*); *ss.* 43, 44, 49—13 *Eliz. c.* 5.

In December, 1902, S., an insolvent trader, through the agency of N., sold and transferred his business and book debts, and also the business of M. which he had contracted to purchase, and a large quantity of stock bought on credit not in the ordinary course of business, for 35,539*l.* to a company which he promoted for that purpose. The purchase-money was paid, as to 400*l.* in cash, as to 10,000*l.* in 100 debentures of 100*l.* each of the company, and as to the balance in fully paid-up shares of the company. The debentures, at the request of N., were issued as follows—seven to B., fifteen to Z., thirty to N., thirty to M., and eighteen to S. The fully paid-up shares for the balance of the purchase-money were allotted to S., who had been appointed chairman of the board of directors. The debentures issued to N. were the remuneration for his services to S. in the matter, and B. and Z. were cash creditors of S. The first acting directors of the company and N. were the mere instruments of S. in carrying through this transaction, which divested S. of substantially the whole of his property, and left him with trade creditors to a large amount and some cash creditors totally unprovided for. M.'s business was genuine, and he acted in good faith and without notice of any fraud. He accepted the 400*l.* in cash and his debentures as payment for his business; and there were some bonâ fide shareholders of the company. Within three months S. was adjudicated bankrupt:—

Held, that the transfer of S.'s property to the company was fraudulent and an act of bankruptcy within sub-s. 1 (*b*) of s. 4 of the Bankruptcy Act, 1883; that under the circumstances the company must be taken to have had notice of the fraud; and that under ss. 43 and 44 of the

BANKRUPTCY—*continued.*

Act the trustee in bankruptcy, as against the company, was entitled to the property of S.:

Held, also, that under the circumstances N. was a party to the fraud, and that his debentures were not a charge upon the property of S. in the hands of the trustee:

But *held*, that M. was protected by s. 49 of the Act, and that his debentures were a charge upon the property of S. in the hands of the trustee so far as the assets of the company might prove insufficient to satisfy the same.

In January, 1903, in a debenture-holder's action, a receiver was appointed of the business of the company. Subsequently B. and Z. sold their debentures to X. and Y. at a heavy discount. X. and Y. were acquainted with S., and knew that he had transferred his business to the company and had become bankrupt. They also knew of the debenture-holder's action and of the appointment of the receiver, and they respectively purchased their debentures without making any inquiries:—

Held, that under the circumstances X. and Y. were put upon inquiry, and could not be said to be purchasers for value without notice, and that their debentures were not a charge upon the property of S. in the hands of the trustee. *In re* SLOBODINSKY. *Ex parte* MOORE **Wright J. 517**

5. —— *Property of Bankrupt—Secured Creditor—Administration Action—Order for Payment into Court of Debt due by Defendant to Testatrix—Non-compliance—Sequestration against Defendant—Payment of Money into Court to "Account of Sequestrators"—Bankruptcy of Defendant—Title of Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45.

The issue of a writ of sequestration to enforce an order for the payment of a debt into court, coupled with the receipt of money of the debtor by the sequestrator, does not of itself make the creditor a secured creditor within the meaning of the Bankruptcy Act, 1883.

An executor, who at the date of the death of his testatrix was indebted to her, was made defendant to an action in the Chancery Division brought by his co-executors for the administration of her estate. On the further consideration of the action an order was made that the defendant should pay into court to the credit of the action the amount which had been found due from him. He failed to obey the order, and on the application of the plaintiffs a writ of sequestration was issued against him. The order was served upon a bank with which he had an account, and an order was afterwards made directing the bank to pay into court to the credit of the action, "the sequestrator's account," the balance standing in their books to the credit of the defendant. This payment was accordingly made on August 6, and the same day a receiving order in bankruptcy was made against the defendant upon a creditor's petition presented on the previous July 13. He was afterwards adjudicated a bankrupt:—

Held, that the plaintiffs did not by virtue of the sequestration, or by the subsequent payment into court, become secured creditors of the bankrupt, but that the money in court had passed to

BANKRUPTCY—*continued.*
the trustee as part of the property of the bankrupt divisible among his creditors.

Decision of Wright J. affirmed.

In re Hastings, (1892) 9 Morr. 234, approved and followed.

Per Romer L.J.: The effect and operation of a sequestration explained.

Semble, that if an order had been made that the balance of the fund, after payment of the sequestrator's costs, should be carried to the general credit of the action, the plaintiffs would have been in the position of secured creditors of the bankrupt. *In re* H. E. Pollard. *Ex parte* S. R. Pollard - - - **C. A. 41**

—— Councillor—Disqualification for "holding" office—Remedy by quo warranto **693**
See Corporation.

—— Debt—Equitable assignment—Bankruptcy of assignor before receipt of letters **208**
See Assignment.

BENEFICE.
See under Ecclesiastical Law.

BILL OF LADING — Cargo — Negligence — Damage—"Faults or errors in management of vessel" - - - **666**
See Shipping. 1.

—— "Unseaworthiness"—Unfitness of ship to carry cargo - - - - **378**
See Shipping. 2.

BILL OF SALE—*Copy filed on Registration—Omissions from Copy—Affidavit—Term for Maintenance of the Security—Covenant to replace worn-out Articles—Substituted Chattels, Assignment of—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 6, 9—*Liverpool Court of Passage—Interpleader Issue—New Trial—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict. c.* 37), *s.* 10.

An application lies to the Court of Appeal for a new trial of an interpleader issue tried in the Liverpool Court of Passage as in the case of any other issue there tried.

Where, a bill of sale in proper form having been duly executed and attested, the copy of it filed in pursuance of the Bills of Sale Act, 1878, s. 10, sub-s. 2, omitted the signature of the grantor, and the signature, address, and description of the attesting witness, but the affidavit filed with the copy stated that the bill of sale was duly executed by the grantor in the presence of the attesting witness, giving his name, address, and description:—

Held, that the bill of sale was valid, as the matters omitted in the copy of the bill of sale might be supplied by reference to the affidavit filed therewith.

Thomas v. *Roberts*, [1898] 1 Q. B. 657, followed.

By a bill of sale, given as a security for the payment of money, the grantor assigned to the grantee the chattels and things specifically described in a schedule thereto, and also all chattels and things which might at any time during the continuance of the security be substituted for them or any of them. The bill of sale

BILL OF SALE—*continued.*
contained a covenant by the grantor that he would during the continuance of the security replace such of the chattels and things expressed to be assigned as should be worn out by other articles of value equal to the present value of the articles worn out, so as at all times to keep up the total value of the chattels and things comprised in the security to the present value:—

Held, that the bill of sale did not deviate from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, the assignment of substituted chattels and things only applying to chattels and things substituted under the covenant for the maintenance of the security.

Seed v. *Bradley*, [1894] 1 Q. B. 319, followed.
Coates v. Moore - - - **C. A. 140**

2. —— *Form in Schedule, Deviation from—Repayment by Instalments—Omission of Monetary Denomination—Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale to secure a loan of 70*l.* and interest at 1*s.* in the pound per month stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date in each month:—

Held, that as, having regard to the amount of monthly interest, the bill of sale could only be paid off if the repayments were at the rate of 7*l.* per month, the bill of sale was not rendered invalid by the omission of any unit of monetary denomination after the word "seven," and was not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882. Mourmand *v.* Le Clair. Provincial Union Bank, Claimants **Div. Ct. 216**

BOND—Arrest of debtor—Forfeiture of bond—Form of bond - - - **164**
See Bankruptcy. 1.

BREACH OF CONTRACT—Procuring — Action, Cause of—Conspiracy—Justification—"Stop-day" - - - **545**
See Trade Union. 2.

BUILDING—Party wall—Expense of raising—Jurisdiction of arbitrators - **463**
See London. 1.

—— "Public building" — Electrical station—Workhouse - - - - **483**
See Factory Acts. 1.

BUSINESS—Right of company to carry on—Debentures—Floating security—Set-off
See Company. 1. **367**

BY-LAW—Reasonableness — Discretion of justices - - - - **245**
See Local Government. 1.

CALLS — Bankruptcy notice — Set-off — Mutual creditor—Judgment debt - - **340**
See Bankruptcy. 2.

CARGO—Insurance.
See under Insurance, Marine.

CASES:—

—— *Allen* v. *Flood*, - - [1898] A. C. 1
Considered by C. A. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND **[1903] 2 K. B. 600**

—— *Attorney-General* v. *Dobree*, [1900] 1 Q. B. 442.
Followed by Ridley J. ATTORNEY-GENERAL *v.* MURRAY **[1903] 2 K. B. 64**

—— *Attorney-General* v. *Robinson*, [1901] 2 I. R. 67.
Followed by Ridley J. ATTORNEY-GENERAL *v.* MURRAY **[1903] 2 K. B. 64**

—— *Baines, Re* - (1902) 86 L. T. (N.S.) 691
Disapproved by C. A. *In re* PILLING **[1903] 2 K. B. 50**

—— *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Eq. 259.
Principles of, applied by C. A. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND **[1903] 2 K. B. 600**

—— *Cooper and Allen to Harlech, In re*, (1876) 4 Ch. D. 802.
Not followed by Ridley J. ATTORNEY-GENERAL *v.* NORTHUMBERLAND (DUKE OF) **[1903] 2 K. B. 71**

—— *Cunard Steamship Co.* v. *Marten*, [1902] 2 K. B. 624.
Affirmed by C. A. **[1903] 2 K. B. 511**

—— *Daniel* v. *Janes* - (1877) 2 C. P. D. 351
Considered by Div. Ct. MILES *v.* HUTCHINGS **[1903] 2 K. B. 714**

—— *De Hart* v. *Compañia Anonima de Seguros "Aurora,"* [1903] 1 K. B. 109.
Affirmed by C. A. **[1903] 2 K. B. 503**

—— *E. A. B., In re* - [1902] 1 K. B. 457
Explained and distinguished by C. A. *In re* PILLING **[1903] 2 K. B. 50**

—— *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240, 243.
Rule in, applied by C. A. MCDOWALL *v.* GREAT WESTERN RY. CO. **[1903] 2 K. B. 331**

—— *Fenner* v. *Duplock*, (1824) 2 Bing. 10; 27 R. R. 537.
Approved by C. A. SERJEANT *v.* NASH, FIELD & CO. **[1903] 2 K. B. 304**

—— *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 1 K. B. 118.
Reversed by C. A. **[1903] 2 K. B. 545**

—— *Goodlock* v. *Cousins*, [1897] 1 Q. B. 348, 558
Distinguished by Div. Ct. CRANE & SONS *v.* ORMEROD **[1903] 2 K. B. 37**

—— *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 1 K. B. 367.
Affirmed by C. A. **[1903] 2 K. B. 657**

—— *Grimwood* v. *Moss*, (1872) L. R. 7 C. P. 360.
Approved by C. A. SERJEANT *v.* NASH, FIELD & CO. **[1903] 2 K. B. 304**

—— *Grissell's Case* - (1866) L. R. 1 Ch. 528
See In re G. E. B., A DEBTOR **C. A. [1903] 2 K. B. 340**

CASES—*continued.*

—— *Harris* v. *Scaramanga*, (1872) L. R. 7 C. P. 481.
Rule in, applied by C. A. DE HART *v.* COMPAÑIA ANONIMA DE SEGUROS "AURORA" - **[1903] 2 K. B. 503**

—— *Hastings, In re* - (1892) 9 Morr. 234
Approved and followed by C. A. *In re* POLLARD - - **[1903] 2 K. B. 41**

—— *Islington Borough Council* v. *London School Board*, [1902] 2 K. B. 701.
Affirmed by C. A. **[1903] 2 K. B. 354**

—— *Kelly, In re* - - [1895] 1 Q. B. 180
Approved and followed by Div. Ct. *In re* BURTON AND BLINKHORN **[1903] 2 K. B. 300**

—— *King* v. *England* - (1864) 4 B. & S. 782
Dictum of Blackburn J. in, affirmed by Div. Ct. MOORE, NETTLEFOLD & CO. *v.* SINGER MANUFACTURING CO. **[1903] 2 K. B. 168**

—— *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. 526.
Principles of, applied by C. A. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND **[1903] 2 K. B. 600**

—— *Little* v. *MacLellan, Ld.* - (1900) 2 F. 387
Distinguished by C. A. OLIVER *v.* NAUTILUS STEAM SHIPPING CO. **[1903] 2 K. B. 639**

—— *McDowall* v. *Great Western Ry. Co.*, [1902] 1 K. B. 618.
Reversed by C. A. **[1903] 2 K. B. 331**

—— *Manchester Overseers* v. *Ormskirk Union*, (1890) 24 Q. B. D. 678.
Not followed by Div. Ct. WEST HAM UNION *v.* HOLBEACH UNION **[1903] 2 K. B. 627**

—— *Manders* v. *Manders* - [1897] 1 Q. B. 474
Distinguished by Div. Ct. RUTHER *v.* RUTHER - - **[1903] 2 K. B. 270**

—— *Melville* v. *Mirror of Life Co.*, (1895) 2 Ch. 531.
Observations in judgment disapproved by C. A. BOUCAS *v.* COOKE **[1903] 2 K. B. 227**

—— *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25.
Considered by C. A. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND **[1903] 2 K. B. 600**

—— *Ormskirk Union* v. *Chorlton Union*, [1903] 1 K. B. 19.
Affirmed by C. A. **[1903] 2 K. B. 498**

—— *Pitt, Ex parte*, (1833) 2 Dowl. 439; 39 R. R. 734.
Followed by C. A. *In re* A SOLICITOR **[1903] 2 K. B. 205**

—— *Pollard, In re* - - [1902] W. N. 144
See In re POLLARD **C. A. [1903] 2 K. B. 41**

—— *Pollard* v. *Photographic Co.*, (1888) 40 Ch. D. 345.
Approved by C. A. BOUCAS *v.* COOKE **[1903] 2 K. B. 227**

CASES—*continued.*

—— *Quinn* v. *Leathem* - [1901] A. C. 495
Considered by C. A. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND [1903] 2 K. B. 600

—— *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.*, (1902) 8 Com. Cas. 1.
Reversed by C. A. [1903] 2 K. B. 378

—— *Reg.* v. *Elvet* - (1859) 2 E. & E. 266
Followed by Div. Ct. WEST HAM UNION *v.* HOLBEACH UNION [1903] 2 K. B. 627

—— *Rendall* v. *Hill's Dry Docks and Engineering Co.*, [1900] 2 Q. B. 245.
Explained by C. A. OLIVER *v.* NAUTILUS STEAM SHIPPING CO. [1903] 2 K. B. 639

—— *Rowson* v. *Atlantic Transport Co.*, [1903] 1 K. B. 114.
Affirmed by C. A. [1903] 2 K. B. 666

—— *Seed* v. *Bradley* - [1894] 1 Q. B. 319
Followed by C. A. COATES *v.* MOORE [1903] 2 K. B. 140

—— *Sheffield Corporation* v. *Barclay*, [1903] 1 K. B. 1.
Reversed by C. A. [1903] 2 K. B. 580

—— *Simpkin* v. *Birmingham Justices*, (1872) L. R. 7 Q. B. 482.
Approved by C. A. REX *v.* LONDON COUNTY JUSTICES - [1903] 2 K. B. 19

—— *Tarn, In re* - - [1893] 2 Ch. 280
Followed by C. A. VAN LAUN & Co. *v.* BARING BROTHERS & Co. [1903] 2 K. B. 277

—— *Taylor* v. *Caldwell* - (1863) 3 B. & S. 826
Discussed and applied by C. A. KRELL *v.* HENRY - - [1903] 2 K. B. 740
Discussed and applied by Div. Ct. BLAKELEY *v.* MULLER & Co. [1903] 2 K. B. 760, n.

—— *Thomas* v. *Roberts* - [1898] 1 Q. B. 657
Followed by C. A. COATES *v.* MOORE [1903] 2 K. B. 140

—— "*Vortigern*," *The* - - [1899] P. 140
Applied by C. A. GREENOCK STEAMSHIP CO. *v.* MARITIME INSURANCE CO. [1903] 2 K. B. 657

—— *Wakelin* v. *London and South Western Ry. Co.*, (1886) 12 App. Cas. 41.
Considered and applied by C. A. POMFRET *v.* LANCASHIRE AND YORKSHIRE RY. CO. - - [1903] 2 K. B. 718

—— *Worthington* v. *Curtis* (1875) 1 Ch. D. 419
Discussed by Ridley J. ATTORNEY-GENERAL *v.* MURRAY [1903] 2 K. B. 64

CHAIRS—Chairs fastened to floor of place of entertainment — Hiring agreement — Mortgage of building and fixtures 135
See FIXTURES.

CHARTERPARTY.
See under SHIPPING.

CHEQUE—Given in part payment before performance rendered impossible—Payment of cheque subsequently stopped—Right to recover on cheque - - 476
See CONTRACT. 3.

CHILD.
See under INFANT.

CHURCH.
See under ECCLESIASTICAL LAW.

COAL—Warranty of seaworthiness, Breach of—Steamship insufficiently provided with coal - - - - - 657
See INSURANCE, MARINE. 2.

COMMISSION—Right to retain—Secret profit
See PRINCIPAL AND AGENT. 2. 635

COMPANY—*Debentures—Floating Security—Set-off—Second Debenture-holders, Right of—Liberty of Company to Carry on Business.*

A debenture issued by a trading company to their bankers and payable on August 1, 1900, provided that the debenture should be a first charge upon all the company's undertaking and property, present and future; that such charge was to be a floating security, but so that the company were not to be at liberty to create any mortgage or charge in priority to, or upon an equality with, that debenture; that the company should be at liberty to carry on their business until default should be made in payment of the principal sum secured, or until a receiver should be appointed, and that from and after such default, or the appointment of a receiver, the liberty of the company to carry on their business should forthwith cease and determine, and the charge created by the debenture should be immediately enforceable. The company subsequently issued to the defendants, with whom they had been and were trading, a debenture payable on October 1, 1900, and expressed to be subject to the debenture held by the bankers. The company made default in payment both of the debenture issued to the bankers and of that issued to the defendants. The bankers took no steps to stop the company carrying on their business until October 2, 1901, when they appointed a receiver. In an action brought by the company and the bankers to recover from the defendants the balance of the price of goods sold and delivered by the company to the defendants between July 1, 1900, and October 1, 1901:—

Held, that the defendants were entitled to set off the sum which, on October 1, 1900, became due under their debenture against the sum due to the plaintiffs for the goods. EDWARD NELSON & Co. *v.* FABER & Co. - **Joyce J. 367**

2. —— *Indemnity—Forged Transfer of Stock—Innocent Presentment for Registration—Implied Contract to indemnify.*

The defendants presented for registration a transfer to themselves of stock issued by the plaintiff corporation with a letter requesting the corporation to register the transfer and to send them a new certificate. One of the signatures to the transfer was in fact forged, though the defendants believed it to be genuine. The corporation, believing the transfer to be genuine, registered it, and issued a certificate to the defendants as holders of the stock. It was admitted that there was no negligence on the part of the corporation, and that the defendants acted bonâ fide. Soon afterwards the stock was sold, and was transferred to the purchaser, who was duly registered as holder.

Some years afterwards the forgery was dis-

COMPANY—*continued.*
covered, and the corporation were compelled to make good the loss to the original holder by purchasing other stock for him. The duties of the corporation as to the transfer of stock were regulated by a private Act the provisions of which were in substance the same as those of the Companies Act, 1862, with regard to the transfer of shares in companies formed under that Act:—

Held, that as the transfer to the defendants was registered and the certificate issued to them by the corporation in pursuance of their statutory duty, and not voluntarily by reason of a request by the defendants, there was no implied contract by the defendants to indemnify the corporation against the loss which they had sustained.

Decision of Lord Alverstone C.J., [1903] 1 K. B. 1, reversed. SHEFFIELD CORPORATION *v.* BARCLAY - - - - **C. A. 580**

3. —— *Prospectus inviting Subscriptions for Shares—Misrepresentations by Promoters or Directors in Prospectus—Contribution between Wrongdoers—Action for Fraudulent Misrepresentation—Third-party Procedure—Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *ss.* 3, 5.

Where two co-promoters of a company join in the issue of a prospectus inviting subscriptions for shares in the company, with knowledge that a statement contained in that prospectus is untrue, and damages are recovered by a person induced to take shares in the company by that statement in an action for fraudulent misrepresentation against one of them, he is entitled to contribution from the other under s. 5 of the Directors Liability Act, 1890. GERSON *v.* SIMPSON. REITLINGER AND OTHERS, THIRD PARTIES **C. A. 197**

4. —— *Transfer—Insufficient Stamp—Refusal to register—Right to go behind that which appears in Document—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4; *s.* 17.

A transfer to the plaintiff of shares in the defendant company was presented for registration. The stamp on the transfer was in accordance with the consideration stated on the face of it, but it was discovered that the consideration so stated was less than that which had been given. The directors thereupon refused to register the transfer. In an action to recover damages arising out of this refusal:—

Held, that since a transfer not duly stamped according to law would not, by reason of s. 14, sub-s. 4, of the Stamp Act, 1891, be available in a Court of law either to enforce rights of the company against the transferee, or to justify an alteration of the register of shareholders, the directors were entitled to refuse to register the transfer, and that in determining whether the transfer was duly stamped they were entitled to go behind that which appeared on the face of the document. MAYNARD *v.* CONSOLIDATED KENT COLLIERIES CORPORATION, LIMITED **C. A. 121**

—— Calls—Bankruptcy notice—Set-off—Mutual credits—Judgment debt - - **340**
See BANKRUPTCY. 2.

—— Fraudulent assignment—Insolvent trader—Transfer of his business and another's to company for shares and debentures **517**
See BANKRUPTCY. 4.

COMPANY—*continued.*
—— Stamp duty—Debenture stock, Consolidation of—Issue of loan capital - - **86**
See REVENUE. 4.

COMPENSATION—Lands Clauses Act—Site of church—Union of Benefices Act **728**
See LANDS CLAUSES ACTS. 1.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

COMPOSITION—Scheme of arrangement—Conditional release—Approval of Court **50**
See BANKRUPTCY. 3.

CONDITION—Contract—For fixed period of time—Implied condition as to - - **287**
See CONTRACT. 1.

—— Implied condition—Contract—Impossibility of performance - - - **740**
See CONTRACT. 4.

CONDITIONAL RELEASE — Composition — Scheme of arrangement - - **50**
See BANKRUPTCY. 3.

CONFLICT OF LAWS—*Agreement made Abroad to stifle Foreign Prosecution — Agreement not illegal where made—Whether enforceable here.*

The husband of the defendant having fraudulently misappropriated in France certain moneys of the plaintiff, the plaintiff threatened to prosecute him in the French Court. Thereupon the defendant, by an agreement made in France, agreed to pay to the plaintiff by instalments out of her own money the amount so misappropriated by her husband, upon the terms that the plaintiff should abstain from prosecuting. The agreement was intended by the parties to be wholly performed in France, and by the French law that agreement was not invalid. An action having been brought in this country to recover instalments due under the agreement:—

Held, that as by the law of the country where the contract was made and was to be performed the contract was not invalid, the action was maintainable here. KAUFMAN *v.* GERSON **Wright J. 114**

CONSIDERATION—Failure of—Naval review—Liability of hirer - - - **683**
See CONTRACT. 7.

CONSPIRACY—Trade union.
See Cases under TRADE UNION.

CONSTRUCTIVE NOTICE—Lease, Purchase of—Unusual and onerous covenants—Duty of vendor - - - **487**
See VENDOR AND PURCHASER.

CONTEMPT OF COURT—*Publication tending to prejudice Fair Trial—Newspaper—Cause not yet pending in High Court—Jurisdiction of High Court to attach.*

Where, a person having been charged before the petty sessions with an indictable offence triable only at the assizes, matter is published in a newspaper tending to interfere with the fair trial of the charge, the High Court has jurisdiction to attach the publisher of such matter for contempt of Court, notwithstanding that at the time of the publication the person charged had not yet been committed for trial. THE KING *v.* PARKE - - - - **Div. Ct. 432**

CONTRACT—*For fixed Period of Time—Continuance of Circumstances necessary to Performance of Contract—Implied Condition.*

By a contract made between the plaintiffs, who were dealers in tobacco, and the defendant, it was agreed that, in consideration of the defendant undertaking to become a customer of the plaintiffs and to purchase goods direct from them, and not to sign any agreement with any other firm in the tobacco trade which would prevent him from dealing with the plaintiffs, the plaintiffs would thenceforward for a period of four years distribute as an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively, a certain fixed annual sum, and also the expected profits on certain goods sold by the plaintiffs during that period. Before the four years had expired the plaintiffs sold their business to third persons. In an action for the price of goods sold to him the defendant counterclaimed against the plaintiffs for damages for breach of the contract:—

Held, that it was an implied term of the contract that the plaintiffs would continue to carry on business during the full period of four years, and that they would not during that period do any act disabling themselves from earning profits or preventing the defendant from being a customer of the plaintiffs, and that the defendant was entitled to damages. OGDENS, LIMITED *v.* NELSON. THE SAME *v.* TELFORD **Lord Alverstone C.J. 287**

2. —— *Illegality—Wagering Policy—Insurable Interest—Action to recover Premiums paid—Insurance Law, Knowledge of.*

The fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life.

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by the plaintiff upon the life of his mother would be a good and valid insurance, and the plaintiff, relying upon that representation, effected an insurance with the defendants on his mother's life, and paid premiums thereunder. The policy being illegal and void for want of an insurable interest:—

Held, that, as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not in pari delicto, and the premiums could consequently be recovered back. HARSE *v.* PEARL LIFE ASSURANCE COMPANY - - **Div. Ct. 92**

3. —— *Performance—Prevention by Accident—Misfortune beyond Control of either Party—Cheque given in Part Payment before Performance rendered impossible—Payment of Cheque subsequently stopped—Right to recover on Cheque.*

The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the "Navy League," to supply at an agreed rate the refreshments on a steamer hired by the defendants for the purpose of taking members of the Navy League to the naval review on the occasion of the King's coronation. By the

CONTRACT—*continued.*

contract 300*l.* was to be paid by the defendants to the plaintiff on the Monday previous to the review day, and it was a term of the contract that, in the event of the cancellation of the review before any expense had been incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, &c., but nothing on refreshments. A cheque for 300*l.* was sent by the defendants to the plaintiff on the stipulated day, but was not paid by the plaintiff into his bank. On the next day, owing to the illness of the King, the review was cancelled. An endeavour was subsequently made to effect an arrangement between the parties, but ultimately the defendants stopped payment of the cheque before it was presented:—

Held, in an action on the cheque, that upon the cheque being stopped the rights of the parties were the same as though it had never been given, and that the plaintiff was not entitled to recover. ELLIOTT *v.* CRUTCHLEY **Ridley J. 476**

4. —— *Performance, Impossibility of—Coronation Procession—Assumption that Procession would pass—Implied condition—Necessary Inference—Surrounding Circumstances—Substance of Contract.*

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the coronation processions, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent:—

Held (affirming the decision of Darling J.), from necessary inferences drawn from surrounding circumstances, recognised by both contracting parties, that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract.

Taylor v. *Caldwell*, (1863) 3 B. & S. 826, discussed and applied. KRELL *v.* HENRY **C. A. [1903] 2 K. B. 740**

5. —— *Performance, Impossibility of—Coronation Procession—Rights of Parties when Performance of Contract has become impossible.*

On May 23, 1902, the plaintiff's agent, having seen a plan of certain seats to view the coronation procession appointed to take place on June 27, which seats it was proposed to erect on the ground floor of a shop, paid the defendants fifteen guineas for three numbered seats. The seats were to be on a structure to be erected by the defendants, and the structure and seats were

CONTRACT—*continued.*

afterwards erected by them. The procession not having taken place in consequence of the King's illness, the plaintiff brought this action. The county court judge gave judgment for the defendants. In *Hobson* v. *Pattenden & Co.* the facts raised substantially the same question:—

Held, that each party must rest in the position in which he is found to be when the event occurs which makes the contract impossible of performance, unless there is something special in the terms of the contract which gives one or other of the parties a different right.

Judgment of the county court judge affirmed.

Taylor v. *Caldwell*, (1863) 3 B. & S. 826, discussed and applied. BLAKELEY *v.* MULLER & Co. HOBSON *v.* PATTENDEN & Co.

Div. Ct. 760, n.

6. —— *Performance, Impossibility of—Naval Review—Rights of Parties when Performance of Contract has become impossible—Contract—Construction—Costs—Discretion—Appeal—Trial by Judge without Jury—Order* LXV., *r.* 1—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

By a charterparty dated March 22, 1902, the defendants agreed to let, and the plaintiffs agreed to hire, the defendants' steamer for the term of three days from the hour she was placed at the plaintiffs' disposal in London on the day preceding that of the naval review to be held at Spithead on the occasion of the King's coronation in June or July, 1902; the steamer was to take up passengers at London and Southampton, and proceed to Spithead, arriving in time for the review, and returning to London on the third day of the hiring; and the amount to be paid by the plaintiffs for the hire was a lump sum of 1500*l.*, payable "250*l.* on signing the charter, and the balance ten days before the date of the review." The usual exceptions from owners' liability in respect of perils of the seas, &c., were contained in the charterparty. The plaintiffs paid to the defendants 250*l.* on signing the charterparty, and the balance, 1250*l.*, on June 18, the review having in the meantime been fixed to take place on June 28. The review was, in consequence of the King's illness, postponed on June 25, and thereupon notice that the plaintiffs would not require the steamer was given by them to the defendants, and accordingly she was not placed at the plaintiffs' disposal. The defendants, before the postponement of the review, had incurred expenses amounting to 500*l.* in fitting out the steamer and in doing other things by way of part performance of the contract, or in order to enable them to perform it. The review was not held until the month of August, 1902, and the plaintiffs sued the defendants to recover the 1500*l.* as money paid on a consideration which had failed. At the trial before a judge alone, it appeared that there had been some negotiations for a settlement of the dispute, and the judge expressed his desire that the matter should be left to him to say what, under the circumstances and apart from the strict legal rights of the parties, should be done. The defendants would not agree to that course being taken, and they also declined to accept the judge's suggestion that they should be content to retain the amount of the expenses

CONTRACT—*continued.*

they had incurred and have their costs. In the result the judge gave judgment for the defendants, but ordered that each of the parties should bear their own costs:—

Held, on an appeal by the plaintiffs from the judgment for the defendants, that the plaintiffs were not entitled to recover the money they had paid:

Held, also, on the defendants' appeal from the order that each of the parties should bear their own costs, that there were no materials upon which the judge could exercise his discretion by making that order, and, therefore, that the Court of Appeal had power to entertain the appeal and reverse his decision. CIVIL SERVICE CO-OPERATIVE SOCIETY, LIMITED *v.* GENERAL STEAM NAVIGATION COMPANY - - - C. A. 756

7. —— *Ship—Naval Review—Contract of Hiring—Specific Performance—Failure of Consideration—Liability of Hirer—Demise of Ship.*

In consequence of the public announcement of an intended Royal naval review at Spithead on June 28, 1902, an agreement in writing was entered into between the plaintiffs and the defendant that the plaintiffs' steamship *Cynthia* should be "at the disposal" of the defendant on June 28 to take passengers from Herne Bay "for the purpose of viewing the naval review and for a day's cruise round the fleet; also on June 29 for similar purposes: price 250*l.* payable, 50*l.* down, balance before ship leaves Herne Bay."

On the signing of the agreement the defendant paid the 50*l.* deposit. On June 25 the review was officially cancelled, whereupon the plaintiffs wired to the defendant for instructions, stating that the ship was ready to start, and also requesting payment of the balance. Receiving no reply, the plaintiffs, on June 28 and 29, used the ship for their own purposes, thereby making a profit. On June 29 the defendant repudiated the contract in toto. During the two days in question the fleet remained anchored at Spithead.

In an action by the plaintiffs to recover the balance less the profits made by their use of the ship during the two days:—

Held, reversing the judgment of Grantham J., that the plaintiffs were entitled to recover, because (1) the venture was the defendant's, the risk being his alone; and (2) the happening of the naval review was not the sole basis of the contract, so that there had been no total failure of consideration, nor a total destruction of the subject-matter of contract:

Held, further, that the contract did not operate as a demise of the ship. HERNE BAY STEAM BOAT COMPANY *v.* HUTTON - - C. A. 683

—— Agent in name of principal, but for his own benefit, Contract made by—Liability of principal - - - - 399
See PRINCIPAL AND AGENT. 1.

—— Agreement made abroad to stifle foreign prosecution — Agreement not illegal where made—Whether enforceable here
See CONFLICT OF LAWS. 114

—— Hiring agreement—Chairs fastened to floor of place of entertainment—Mortgage of buildings and fixtures - - 135
See FIXTURES.

CONTRACT—*continued.*

—— Indemnify, Implied contract to — Forged transfer of stock—Innocent presentment for registration - - - **580**
See COMPANY. 2.

—— Procuring breach of contract—Conspiracy—Justification—"Stop-day" - **545**
See TRADE UNION. 2.

CONTRIBUTION—Wrong-doers—Misrepresentations by promoters or directors in prospectus - - - - **197**
See COMPANY. 3.

CONVEYANCING AND LAW OF PROPERTY—Lease, Purchase of—Unusual and onerous covenants—Duty of vendor—Constructive notice - - **487**
See VENDOR AND PURCHASER.

COPY—Filed on registration—Omissions from copy—Affidavit - - - **140**
See BILL OF SALE. 1.

COPYRIGHT — *Photograph — Photograph "made for or on behalf of any other Person for a good or a valuable Consideration"—Photograph taken at request of Sitter—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.

Where a photographer takes a photograph at the request of the sitter upon the terms that the sitter will pay for taking it, or under circumstances which raise an implied promise to pay on the sitter's part, the photograph is "made or executed for or on behalf of any other person for a good or a valuable consideration" within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, and the copyright in the photograph is in the sitter, notwithstanding that the property in the negative, in the absence of any agreement for its purchase, may remain in the photographer.

Pollard v. *Photographic Co.*, (1888) 40 Ch. D. 345, approved.

Melville v. *Mirror of Life Co.*, [1895] 2 Ch. 531, considered, and observations in judgment disapproved. BOUCAS *v.* COOKE - **C. A. 227**

CORONATION PROCESSION—Contract—Impossibility of performance - **740, 760, n.**
See CONTRACT. 4, 5.

CORPORATION — *Councillor — Disqualification for "holding" Office — Bankruptcy — Remedy by Quo Warranto—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 87—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32.

By s. 32 of the Bankruptcy Act, 1883, a debtor who is adjudged bankrupt is disqualified for (inter alia) being elected to or holding or exercising the office of councillor, a disqualification limited by s. 9 of the Bankruptcy Act, 1890, to five years from the date of discharge. By s. 87 of the Municipal Corporations Act, 1882, a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was at the time of the election disqualified, and shall not be questioned on that ground except by an election petition.

A debtor was adjudicated a bankrupt in April, 1899, and in the following July obtained an order of discharge subject to suspension for two years and a half, which came into operation in January, 1902. In November, 1902, an election

CORPORATION—*continued.*

was held of councillors for a municipal borough, at which he was nominated and declared elected. In 1903 a rule nisi was obtained for a quo warranto calling on him to shew cause why he held and exercised the office of borough councillor:—

Held, that the remedy by quo warranto was taken away by s. 87 of the Municipal Corporations Act, 1882, only in those cases where the election was questioned on the ground of disqualification for election, and that bankruptcy being by s. 32 of the Bankruptcy Act, 1883, a disqualification not merely for election, but also for "holding" the office of councillor, quo warranto would lie. THE KING *v.* BEER - - **Div. Ct. 693**

COSTS.
See under PRACTICE.

COUNCILLOR — Disqualification for "holding" office — Bankruptcy — Remedy by quo warranto - - - - **693**
See CORPORATION.

COUNSEL—Necessity of appearing by—Solicitor—Allegation of professional misconduct
See SOLICITOR. 1. **205**

COUNTY COURT—*Execution—Seizure of Goods not the Property of Judgment Debtor—No claim made by Owner — Sale — Title of Purchaser — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 154.

Where goods are taken in execution by the bailiff of a county court, and, no claim having been made to them, are sold by the bailiff, and it subsequently appears that they were not the property of the judgment debtor at the time of the seizure or sale, the purchaser does not acquire a good title to the goods as against the real owner.

Goodlock v. *Cousins*, [1897] 1 Q. B. 348, 558, distinguished. CRANE & SONS *v.* ORMEROD **Div. Ct. 37**

COVENANT — Lease — Assignment — Breach of covenant—Forfeiture - - **304**
See LANDLORD AND TENANT. 2.

—— Lease—Negative—Proviso for re-entry **241**
See LANDLORD AND TENANT. 3.

—— Lease, Purchase of—Unusual and onerous covenants—Duty of vendor—Constructive notice - - - - **487**
See VENDOR AND PURCHASER.

CREDITOR—Bankruptcy practice.
See under BANKRUPTCY.

CRIMINAL LAW—*Malicious Injury to Property—Shooting at Dog—Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 41.

An information under 24 & 25 Vict. c. 97, s. 41, was laid against the appellant, a gamekeeper, for unlawfully and maliciously killing a dog; the dog was at the time near an aviary in which pheasants, the property of the appellant's master, were confined for breeding purposes:—

Held, that the test of the appellant's liability under the section was whether he acted under the bonâ fide belief that what he was doing was necessary for the protection of his master's property, and that it was the only way in which the property could be protected.

Daniel v. *Janes*, (1877) 2 C. P. D. 351, considered. MILES *v.* HUTCHINGS - **Div. Ct. 714**

CRIMINAL LAW—*continued.*

2. —— *Sale of Intoxicating Liquors to Children—Sale by Servant contrary to Instructions of Licensee—"Knowingly allows any Person to Sell"—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, "every holder of a licence who knowingly sells or delivers, or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only," is made liable to penalties.

Intoxicating liquor was knowingly sold to a child under fourteen in a bottle neither corked nor sealed by a servant of a licensed person contrary to the express orders and without the knowledge of his master, who was himself in charge of the premises at the time of the sale:—

Held, that the licence-holder could not be convicted under s. 2 of "knowingly allowing" a person to sell intoxicating liquor to a child under fourteen in a vessel neither corked nor sealed. EMARY *v.* NOLLOTH - - - **Div. Ct. 264**

CROWN—Arrest of debtor—Forfeiture of bond—Form of bond - - - **164**
See BANKRUPTCY. 1.

DAMAGE—Bill of lading—Cargo—Negligence—"Faults or errors in management of vessel" - - - - **666**
See SHIPPING. 1.

—— Effective cause of—Intervening act of third party—Trespassers, Interference by **331**
See NEGLIGENCE. 2.

—— Malicious injury to property—Shooting at dog - - - - - **714**
See CRIMINAL LAW. 1.

—— Trade union, Liability of, for wrongful acts of agents - - - - **600**
See TRADE UNION. 1.

"DAYS"—Marine insurance—Voyage policy **363**
See INSURANCE, MARINE. 4.

DEBENTURES.
See under COMPANY.

DEBT—Assignment, Equitable—Bankruptcy of assignor before receipt of letters - **208**
See ASSIGNMENT.

—— Bankruptcy notice—Set-off—Mutual credits—judgment debt—Calls - - **340**
See BANKRUPTCY. 2.

—— "Debt or obligation"—Liability of estate of deceased partner - - - **212**
See PARTNERSHIP.

DEFAMATION—*Libel—Fair Comment—Literary Work—Honest Criticism—Withdrawal of Case from Jury.*

A "fair comment" upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion, and does not go beyond the limits of what may fairly be called criticism, is no libel, even although the comment be not such as a jury might think to be a just or reasonable appreciation of the work criticized.

If in an action of libel there is no evidence of anything beyond such a comment as above mentioned, there is no case for the jury. MCQUIRE *v.* WESTERN MORNING NEWS COMPANY **C. A. 100**

DEMISE — Ship — Contract of hiring — Naval review - - - - **683**
See CONTRACT. 7.

DESERTION — Seaman — Forfeiture of wages—Deduction by consent - - **453**
See SHIPPING. 3.

DETERMINATION — Lease — Service of writ — Election to determine tenancy - **304**
See LANDLORD AND TENANT. 2.

DIRECTOR—Misrepresentations by promoters or directors in prospectus—Liability **197**
See COMPANY. 3.

DISCHARGE — Bankruptcy notice — Set-off — Mutual credits—Judgment debt—Calls **340**
See BANKRUPTCY. 2.

DISCRETION—Costs—Appeal — Trial by judge without jury - - - - **756**
See CONTRACT. 6.

—— Justices—By-law—Reasonableness - **245**
See LOCAL GOVERNMENT. 1.

—— Solicitor—Striking off rolls—Punishment—Discretion of Court - - **300**
See SOLICITOR. 2.

DISENTAILING DEED—Succession duty—Succession derived from alienee - **71**
See REVENUE. 6.

DISQUALIFICATION—Councillor—Bankruptcy—Quo warranto - - - **693**
See CORPORATION.

DISTRESS—Sale—Purchase by landlord of goods distrained - - - - **168**
See LANDLORD AND TENANT. 1.

DIVIDED PARISHES—Settlement (Poor Law) **627**
See POOR LAW. 1.

DOG—Shooting at—Malicious injury to property **714**
See CRIMINAL LAW. 1.

DUTY—Public revenue.
See under REVENUE.

EARNINGS — Workmen's Compensation — Railway guard - - - - **26**
See EMPLOYER AND WORKMAN. 2.

ECCLESIASTICAL LAW — Church, Site of — Lands Clauses Act — Compensation — Union of benefices - - - **728**
See LANDS CLAUSES ACTS. 1.

ELECTRICITY—Factory—Electrical station — "Public building"—Workhouse **483**
See FACTORY ACTS. 1.

EMPLOYER AND WORKMAN—*Compensation—Accident—"Arising out of and in the course of the Employment" — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

Upon an application for compensation under

EMPLOYER AND WORKMAN—*continued.*

the Workmen's Compensation Act, 1897, the burden is upon the applicant of giving evidence to shew that the accident arose "out of" as well as "in the course of" the employment of the injured workman. Although the fact that the accident happened in the course of the employment may be admitted, that burden is not discharged if the manner in which the accident happened is left wholly unexplained, and if the evidence is equally consistent with the view that it happened in consequence of something which did not arise out of the employment.

Wakelin v. *London and South Western Ry. Co*,. (1886) 12 App. Cas. 41, considered and applied. POMFRET *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - **C. A. 718**

2. —— *Compensation — Earnings — Railway Guard—Lodging Allowance—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule*, (1), (*a*), (*i*).

A railway guard, in the course of his duty, had frequently to lodge away from home, and on these occasions he was entitled to be paid, in addition to his ordinary wages, certain fixed sums, under the name of lodging allowances. The object of the allowances was to cover out of pocket expenses, to which he was put by having to sleep away from home, and the amount of the allowances was about equal to the cost of board and lodging for the time covered by the allowances. No inquiry was made by the railway company as to the actual expense incurred by the guard, and there was no evidence as to profit being actually made by him out of the allowances. On an appeal against an award of compensation under the Workmen's Compensation Act:—

Held, that, in estimating the earnings of the guard, the amount of the lodging allowances was properly taken into account, without regard to the question whether any profit was made out of them. SHARPE *v.* MIDLAND RAILWAY COMPANY **C. A. 26**

3. —— *Practice—"Proceeding" against Employer—Action against Third Person—"Option," Exercise of — Payments by Employer—Receipts "without Prejudice"—Workman—Personal Injury—Compensation—Damages—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 6.

Where, as between an employer and his workman who has received personal injuries in the course of his employment, there is a payment of money to and a receipt given by the workman under the Workmen's Compensation Act, 1897, and the receipt is not qualified either in terms or by a consideration of the surrounding circumstances, that is sufficient to bring the case within the operation of s. 6, and to put the workman in the position of having exercised the option given him by the section—of proceeding, either at law for damages against the person legally liable for the injury, or against the employer for compensation under the Act, but not against both—and so to preclude him from suing the person legally liable.

Semble, per Romer L.J.: Proceedings by a workman against his employer, under s. 6, for compensation for personal injuries, should not be held to irrevocably bind the workman in the exercise of the option given him by the section unless they have resulted in some compensation, as such, being paid to and received by the workman in such a manner as to bind both parties.

A workman, who had been injured in the course of his employment, gave notice of his injury to his employer, but without formally claiming compensation. The employer, by an agent, then made a first weekly payment, for which the workman, who was then in hospital, signed a receipt stating that the sum paid had been received "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on," &c. Upon the employer's agent bringing him the second payment, the workman stipulated that he would only accept that, and all future payments, "without prejudice." To this the agent assented, whereupon the second and subsequent payments were accepted by the workman, he giving on each occasion a receipt in the same form as before but not stating in terms that the payment was "without prejudice." Eventually he refused to accept any further payments from his employer, and brought an action for damages against the person legally liable for his injury:—

Held, reversing the judgment of Jelf J., that, in the circumstances, the reservation of "without prejudice" was applicable to the first as well as to all subsequent payments, so that the first did not irrevocably bind the plaintiff as an exercise of the option given him by s. 6, and thus preclude him from bringing his action against the other person and recovering damages.

Rendall v. *Hill's Dry Docks and Engineering Co., Ld.*, [1900] 2 Q. B. 245, explained.

Little v. *MacLellan, Ld.*, (1900) 2 F. 387, distinguished. OLIVER *v.* NAUTILUS STEAM SHIPPING COMPANY - - - - **C. A. 639**

—— Factory and workshop.
See under FACTORY ACTS.

—— Negligence of servants, Liability for—Invitation to travel on engine - - **219**
See NEGLIGENCE. 1.

—— Trade union.
See under TRADE UNION.

ENGINE—Invitation to travel on—Liability for negligence of servants - - **219**
See NEGLIGENCE. 1.

ENTRY—Right of, without permission of occupier—Inspection by local authority **183**
See LOCAL GOVERNMENT. 2.

ESTATE DUTY—Policy of life insurance—"Interest purchased or provided by deceased" - - - - **64**
See REVENUE. 1.

ESTOPPEL—Assignment — Lease—Forfeiture — Subsequent payment of rent by occupier to lessee - - - - **304**
See LANDLORD AND TENANT. 2.

EXAMINATION—Bond to enforce debtor's attendance for examination—Forfeiture of bond—Form of bond - - **164**
See BANKRUPTCY. 1.

EXCISE.
See under REVENUE.

EXECUTION—No claim made by owner—Sale—Title of purchaser - - 37
See COUNTY COURT.

FACTORY ACTS—*Factory—Electrical Station—"Public Building"—Workhouse—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1; *Sched. VI., Part I., clause* 20.

By s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, "non-textile factory" means (inter alia) any places named in Part I. of Sched. VI. of the Act. By clause 20 of Part I. of that schedule "electrical stations" are defined as being "any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade, or for the lighting of any street, public place, or public building, or of any hotel, or of any railway, mine, or other industrial undertaking."

An engine-house and machinery, forming part of the premises of a workhouse, were used for the purpose of generating electrical energy for lighting the workhouse and infirmary, and for other purposes. One of the engines in the engine-house was unfenced:—

Held, that the workhouse was a public place within Sched. VI., Part I., clause 20, and the engine-house was therefore a non-textile factory within the meaning of s. 149, sub-s. 1, of the Factory and Workshop Act, 1901. MILE END GUARDIANS *v.* HOARE - - Div. Ct. 483

2. —— *Overtime Employment—Place where allowed—"Warehouse not used for any Manufacturing Process"—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 49, *Sched. II., clause* 4.

By s. 49 of the Factory and Workshop Act, 1901, overtime employment of women is permitted on a limited number of days in the year, and this permission is declared to apply to "the non-textile factories and workshops and parts thereof and warehouses specified in the second schedule to this Act." By Sched. II., factories and workshops in which overtime employment is allowed include (clause 4) "any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods":—

Held, that the prohibition in Sched. II., clause 4, against overtime work being carried on in a part of a factory used for a manufacturing process or handicraft, extended to any part of the factory in which a manufacturing process or handicraft was carried on during the ordinary working hours, and did not merely prevent the overtime work being carried on in a part of the factory which was at the same time being used for a manufacturing process or handicraft. SMITH *v.* SIBRAY, HALL & CO. - - Div. Ct. 707

FINANCE ACTS.
See under REVENUE.

FINE ARTS COPYRIGHT—Photograph taken at request of sitter - - - 227
See COPYRIGHT.

FLOATING SECURITY — Set-off—Debentures—Rights of second debenture-holders 367
See COMPANY. 1.

FIXTURES—*Hiring Agreement—Chairs fastened to Floor of Place of Entertainment—Mortgage of Building and Fixtures—Entry of Mortgagee into Possession—Right of Removal by Owner.*

Chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority:—

Held, that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures. LYON & CO. *v.* LONDON CITY AND MIDLAND BANK - - - Joyce J. 135

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREIGN LAW—General average, Special provision in charterparty as to - 503
See INSURANCE, MARINE. 1.

FOREIGN PROSECUTION — Agreement made abroad to stifle—Agreement not illegal where made—Whether enforceable here 114
See CONFLICT OF LAWS.

FORFEITURE—Bond—Arrest of debtor—Form of bond - - - - 164
See BANKRUPTCY. 1.

—— Lease—Assignment—Breach of covenant
See LANDLORD AND TENANT. 2. 304

—— Wages—Seaman—Desertion—Deduction by consent - - - - 453
See SHIPPING. 3.

FORGERY—Indemnify, Implied contract to — Forged transfer of stock — Innocent presentment for registration - 580
See COMPANY. 2.

FRAUD — Misrepresentations by promoters or directors in prospectus—Directors' liability - - - - 197
See COMPANY. 3.

FRAUDULENT ASSIGNMENT—Insolvent trader—Transfer of his business and another's to company for shares and debentures
See BANKRUPTCY. 4. 517

GAMING—*Whist—Absence of Element of Wagering—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

To constitute gaming the game played must be one which involves the element of wagering; each player must have a chance of losing as well as of winning.

A number of persons hired a room in an hotel for the purpose of playing whist. They played for prizes, which were not subscribed for by the players, but were given by third persons:—

Held, that the whist so played did not

GAMING—*continued.*
amount to gaming within the meaning of s. 17 of the Licensing Act, 1872. LOCKWOOD *v.* COOPER - - - - Div. Ct. 428

GENERAL AVERAGE — Special provision in charterparty as to—Foreign law - 503
See INSURANCE, MARINE. 1.

GOODS—Sale of.
See under SALE OF GOODS.

GOODS SOLD AND DELIVERED—Action for—Liability of estate of deceased partner
See PARTNERSHIP. 212

GUARD—Railway—Workmen's compensation—Earnings—Lodging allowance - 26
See EMPLOYER AND WORKMAN. 2.

HARTER ACT (Act of Congress of U.S.A., 1893), ss. 1, 2, 3 - - - - 666
See SHIPPING. 1.

HIGHWAY—*Exemption from Rate—Liability to repair Ratione Tenuræ—Proof of Exemption from Liability to contribute to Repair of other Highways—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33.

The existence of a liability ratione tenuræ to repair a certain highway does not of itself shew that there is an exemption from liability to contribute to the repairs of other highways in the same highway district; there must be other evidence that the exemption exists in order to prove a legal exemption within s. 33 of the Highway Act, 1835, which provides that, when property, or the owner or occupier in respect thereof, has, prior to the passing of the Act, been "legally exempt" from payment of highway rate, that property and the owners and occupiers thereof shall be exempt from payment of the highway rate thereby imposed. FERRAND *v.* BINGLEY URBAN DISTRICT COUNCIL Div. Ct. 445

HIRING AGREEMENT.
See Cases under CONTRACT.

HOSPITAL — Poor removal — Settlement—Irremovability—Residence - - 498
See POOR LAW. 2.

HUSBAND AND WIFE — *Separation Order — Adultery of Wife—Liability of Husband for subsequent Weekly Payments—Enforcement of Order —Appeal by Case Stated—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 9, 11.

Where an order for a weekly payment by a husband to his wife is made under the Summary Jurisdiction (Married Women) Act, 1895, and the wife subsequently commits adultery, the husband is entitled under s. 7 of the Act, on proof thereof before a Court of summary jurisdiction, to have the order discharged in spite of a finding by the Court that he has been guilty of conduct conducing to the adultery; and he is not liable to make any further payments to his wife, although the order may not have been in terms discharged by the adjudication as to the wife's adultery.

The decision of a Court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Act of 1895 are in arrear, is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division; but the Court has power to state a case for the opinion of the King's Bench Division upon a point of law arising on the information.

Manders v. *Manders*, [1897] 1 Q. B. 474, distinguished. RUTHER *v.* RUTHER Div. Ct. 270

ILLEGITIMACY — Settlement (Poor Law) — Power of illegitimate child under sixteen to acquire settlement - 627
See POOR LAW. 1.

IMPOSSIBILITY—Contract—Performance.
See Cases under CONTRACT.

INCOME TAX—Bank—Purchase of business of another bank - - - 249
See REVENUE. 3.

INDEMNITY—Forged transfer of stock—Innocent presentment for registration — Implied contract to indemnify - 580
See COMPANY. 2.

INFANT — Sale of intoxicating liquors to children - - - - 264
See CRIMINAL LAW. 2.

INN—Sale of intoxicating liquors to children.
See CRIMINAL LAW. 2. 264

INSOLVENCY.
See under BANKRUPTCY.

INSTALMENTS — Repayment by — Form in schedule, Deviation from - - 216
See BILL OF SALE. 2.

INSURANCE, LIFE — Policy — Estate duty — "Interest purchased or provided by deceased" - — - - 64
See REVENUE. 1.

—— Wagering policy — Insurable interest — Action to recover premiums paid 92
See CONTRACT. 2.

INSURANCE, MARINE—*Charterparty*—*"General Average payable according to Foreign Statement" —Special Provision in Charterparty as to General Average—Foreign Law.*

The plaintiff, a shipowner, effected with the defendants, underwriters, a time policy of insurance upon his ship containing the following clause: "General average payable according to foreign statement if so made up." The plaintiff chartered the ship to third persons, and by the terms of the charterparty it was provided that the ship might carry a deckload of timber, and that "in case of average . . . . jettison of deck cargo for the common safety shall be allowable as general average." The ship sailed for Antwerp with a deckload of timber, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck cargo. On her arrival at Antwerp an average statement was there made up,

INSURANCE, MARINE—*continued.*

and the average adjuster, in accordance with the terms of the charterparty, included the jettison of deck cargo in general average. By the Belgian law, apart from contract, the jettison of deck cargo is not the subject of general average; but that law recognises any special provisions in a charterparty as to what shall be the subject of general average:—

Held, applying the rule in *Harris* v. *Scaramanga*, (1872) L. R. 7 C. P. 481, that as the statement had been made up in good faith and the charterparty imported no terms of a special and unusual character such as could not reasonably have been contemplated by the parties to the policy of insurance, the defendants, the underwriters, were bound by the statement, and were therefore liable to indemnify the plaintiff against the ship's proportion of the loss on the jettison of the deck cargo.

Decision of Kennedy J., [1903] 1 K. B. 109, affirmed. DE HART *v.* COMPAÑIA ANONIMA DE SEGUROS "AURORA" - - - **C. A. 503**

2. —— *Round Voyage by Stages—Warranty of Seaworthiness, Breach of—Steamship insufficiently provided with Coal—Burning Ship's Fittings and Cargo—Negligence of Master—"Held Covered" Clause in Policy—Fixing Amount of Premium after Breach of Warranty.*

In the case of a voyage policy upon a steamship, where the contemplated voyage must, from its length, be necessarily divided into stages for coaling purposes, the shipowner is, as between himself and his underwriter, under an implied warranty that the ship shall, at the commencement of each stage of the voyage, be seaworthy for that stage, by having on board a sufficiency of coal for that stage.

The plaintiffs insured their steamship with the defendants for a round voyage from the United Kingdom to port or ports on the west coast of South America and back again, with leave to call at any ports or places on the east coast of South America, &c. The insurance included general average. The perils insured against were of the seas, &c., subject to clauses annexed to the policy which provided (inter alia): "This insurance is also to cover loss through the negligence of the master," &c., and "Held covered in case of any breach of warranty, &c., at a premium to be hereafter arranged."

During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without having sufficient coal on board to take her to St. Vincent, her next place of call, where in ordinary course she would coal again. Her coal supply failing between Monte Video and St. Vincent, the master burnt as fuel some of the ship's fittings, spars, and some of the cargo, and if he had not done so she would have been in danger of becoming a total loss. The plaintiffs did not know until after the ship reached St. Vincent that she had left Monte Video without sufficient coal, and no premium had been arranged under the "held covered" clause. In an action on the policy to recover in respect of the loss of the fittings, spars, and cargo:—

Held, that the policy was a "voyage policy," not a "time policy," and that the voyage was divisible into stages, the case thus falling within *The Vortigern*, [1899] P. 140; and accordingly that as the ship had not, at the commencement of the stage from Monte Video, a sufficiency of coal for that stage, the plaintiffs had broken their implied warranty that she was seaworthy for that stage, so that the policy then ceased to attach to the risks insured against.

Decision of Bigham J., [1903] 1 K. B. 367, affirmed. GREENOCK STEAMSHIP COMPANY *v.* MARITIME INSURANCE COMPANY - **C. A. 657**

3. —— *Suing and Labouring Clause—Applicability—Insurance of Shipowner's Liability to Cargo Owner.*

A number of mules exceeding 20,000*l.* in value having been shipped on the plaintiffs' steamship for carriage, under a contract which contained no clause exempting the plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant and other underwriters at Lloyd's, to protect the plaintiffs against "liability of any kind to the owners of the mules up to 20,000*l.* owing to the omission of the negligence clause" from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual suing and labouring clause. During the voyage the vessel was stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules, and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct loss under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss:—

Held, that the suing and labouring clause was inapplicable to and formed no part of the contract of insurance, and that the plaintiffs were not entitled to recover in the action.

Decision of Walton J., [1902] 2 K. B. 624, affirmed. CUNARD STEAMSHIP COMPANY *v.* MARTEN - - - - - **C. A. 511**

4. —— *Voyage Policy—Construction—Termination of Risk—Insurance for Period after Arrival of Ship—"Days," how to be Reckoned.*

In a policy of insurance on a ship the risk was described as being for a voyage to a named port "and for 30 days in port after arrival however employed," and as running until the ship "hath moored at anchor as above in good safety." The ship arrived in port and was moored at anchor in good safety at 11.30 A.M. on August 2, 1902. She remained in port until September 1, 1902, and was totally lost through perils insured against at 4.30 P.M. on that day:—

Held, that the expression "30 days" in the policy meant thirty consecutive periods of twenty-fours hours each, the first period of which began to run at 11.30 A.M. on August 2, and, therefore, that the policy had ceased to cover the risk when the loss occurred. CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE CORPORATION - **Bigham J. 363**

INTERNATIONAL LAW.

See under CONFLICT OF LAWS.

INTERPLEADER—*Appeal—Summary Decision of Judge—Leave to Appeal—Practice—Rules of Supreme Court, Order* LVII., *rr.* 9, 11—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 5.

Where in interpleader proceedings a judge decides the question as one of law under Order LVII., r. 9, without directing the trial of an issue, or ordering a special case to be stated, his decision is a summary decision within the meaning of the Common Law Procedure Act, 1860, s. 17, and is not subject to appeal, even by leave.

In re Tarn, [1893] 2 Ch. 280, followed. VAN LAUN & Co. *v.* BARING BROTHERS & Co. LEWISON, CLAIMANT - - - **C. A. 277**

—— Issue—New trial—Liverpool Court of Passage - - - - - 140
See BILL OF SALE. 1.

INTOXICATING LIQUORS—Sale of, to children—Sale by servant contrary to instructions of licensee - - - 264
See CRIMINAL LAW. 2.

JUDGMENT DEBT—Bankruptcy notice—Set-off—Mutual credits - - - 340
See BANKRUPTCY. 2.

JUDGMENT DEBTOR—Seizure of goods not the property of—Sale—Title of purchaser
See COUNTY COURT. 37

JUDICATURE ACT — Costs — Jurisdiction — "Good cause"—Alternative defendants
See PRACTICE. 2. 533

JURISDICTION—Arbitrators—Party wall—Expense of raising—Building notice 463
See LONDON. 1.

—— Costs—"Good cause"—Alternative defendants - - - - - 533
See PRACTICE. 2.

—— Publication tending to prejudice fair trial—Jurisdiction of High Court to attach
See CONTEMPT OF COURT. 432

—— Quarter sessions over costs before special sessions - - - - 178
See RATES.

—— Summary Jurisdiction (Married Women) Act—Appeal by case stated - 270
See HUSBAND AND WIFE.

JURY—Notice of intention to summon—Offer by promoters—Time for acceptance 189
See LANDS CLAUSES ACTS. 2.

—— Withdrawal of case from jury—Libel—Honest criticism - - - 100
See DEFAMATION.

JUSTICES — By-law — Reasonableness — Discretion of Justices - - 245
See LOCAL GOVERNMENT. 1.

—— Entry, Right of, without permission of occupier—Inspection by local authority
See LOCAL GOVERNMENT. 2. 183

—— Excise—Spirits—Extraction of spirits from wood of empty cask - - 701
See REVENUE. 2.

JUSTICES—*continued.*

—— Factory — Electrical station — "Public building"—Workhouse - - 483
See FACTORY ACTS. 1.

—— Factory Acts — Overtime employment — "Warehouse not used for any manufacturing process" - - 707
See FACTORY ACTS. 2.

—— Highway—Exemption from rate—Liability to repair ratione tenuræ - - 445
See HIGHWAY.

—— Intoxicating liquors, Sale of, to children—Sale by servant contrary to instructions of licensee - - - - 264
See CRIMINAL LAW. 2.

—— Jurisdiction of quarter sessions over costs before special sessions - - 178
See RATES.

—— Licence—Renewal—Alehouse - 19
See LICENSING ACTS.

—— Malicious injury to property—Shooting at dog - - - - - 714
See CRIMINAL LAW. 1.

—— Poor law—Power of illegitimate child under sixteen to acquire settlement - 627
See POOR LAW. 1.

—— Poor law — Settlement — Irremovability — Residence—Hospital - - 498
See POOR LAW. 2.

—— Publication tending to prejudice fair trial—Jurisdiction of High Court to attach
See CONTEMPT OF COURT 432

—— Sale of food and drugs—Time for return of summons - - - - 163
See ADULTERATION.

—— Seamen—Desertion—Forfeiture of wages—Deduction by consent - 453
See SHIPPING. 3.

—— Separation order—Adultery of wife—Liability of husband for subsequent weekly payments - - - - 270
See HUSBAND AND WIFE.

—— Stamp duty—Medicinal preparations 6
See REVENUE. 5.

—— Whist—Absence of element of wagering—Licensing Act - - - 428
See GAMING.

JUSTIFICATION—Action, Cause of—Procuring breach of contract—"Stop-day" 545
See TRADE UNION. 2.

LANDLORD AND TENANT—*Distress—Sale—Purchase by Landlord of Goods distrained—2 Will & M. Sess.* 1, *c.* 5, *s.* 2.

A sale of goods distrained in pursuance of 2 Will. & M. Sess. 1, c. 5, s. 2, must be a sale to a third party, and if the landlord purchase the goods himself the property in the goods does not pass to him.

Dictum of Blackburn J. in *King* v. *England*, (1864) 4 B. & S. 782, affirmed. MOORE, NETTLEFOLD & Co. *v.* SINGER MANUFACTURING COMPANY **Div. Ct. 168**

2. —— *Lease—Assignment—Breach of Covenant — Forfeiture — Writ claiming Possession—Service of Writ—Election to determine Tenancy—*

LANDLORD AND TENANT—*continued.*

Statement of Ground of Forfeiture—Determination of Tenancy—Effect on Rights of Third Parties—Subsequent Payment of Rent by Occupier to Lessee—Estoppel.

The lessee of premises created a yearly tenancy under which the plaintiff became tenant and occupier of the premises. On the same day the lessee mortgaged the premises by way of sub-demise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, and a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated bankrupt, failing to pay the interest, the mortgagees appointed a receiver, to whom the plaintiff paid a quarter's rent due at the following Midsummer. Before the next quarterly rent became due the lessor issued a writ to recover possession of the premises; but the writ, which was served on the plaintiff (as occupier) and others, did not contain a statement of the ground of forfeiture. The plaintiff after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, and the receiver, under the powers given by the Conveyancing Act, 1881, distrained. In an action by the plaintiff against the receiver for a wrongful distress:—

Held, that the sub-demise to the mortgagees, without the consent of the lessor, constituted a breach of the covenant as to assignment:

Held, also, that the issue and service of the writ to recover possession of the premises operated as a final election by the lessor to determine the term; that to have that effect it was not necessary that the actual ground of forfeiture should be stated; that with the determination of the term the right of the mortgagees to recover rent from the plaintiff came to an end; and that the distress was in consequence illegal:

Held, also, that the payment of rent to the receiver by the plaintiff, after the service upon him of the writ to recover possession of the premises, did not estop him from shewing, on a claim for subsequent rent, that the title of the mortgagees had determined, inasmuch as the mortgagees were not misled by the payment; and

Per Stirling L.J., on the further ground that payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired.

Approving *Fenner* v. *Duplock*, (1824) 2 Bing. 10; 27 R. R. 537.

Grimwood v. *Moss*, (1872) L. R. 7 C. P. 360, approved. SERJEANT *v.* NASH, FIELD & CO. C. A. 304

3. —— *Lease — Negative Covenant — Proviso for Re-entry.*

A lease of a house contained a covenant by the tenant to pay the rent, rates, and taxes, and also a covenant not to use the premises for certain specified purposes without the consent of the lessor, and it contained a proviso that "if the lessee shall commit any breach of the covenants hereinbefore contained and on his part to be performed" the lessor might re-enter:—

Held, that, as the lease contained both affirmative and negative covenants, a proviso for re-entry in the above form must be understood as applying only to breaches of the former. HARMAN *v.* AINSLIE - - Wright J. 241

LANDS CLAUSES ACTS—*Compensation—Severance and injuriously affecting Land—Site of a Church—Possibility of future Sale—Easement—Union of Benefices Act*, 1860 (23 & 24 *Vict. c.* 142)—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 63.

By a private Act incorporating the Lands Clauses Act, 1845, except where expressly varied by the special Act, a railway company were authorized to take the site of a church and land connected therewith in London. By a subsequent private Act of the same company it was provided that the company should not take any part of the church, but might acquire any other part of the property, and an easement or right of using the subsoil under the church, including such part of the crypt and foundations as the company might require. Provision was made for the temporary use of the structure of the church during construction of the works, and, in case of such user before payment of compensation, possession might be obtained under the provisions of s. 85 of the Lands Clauses Consolidation Act, 1845. It was also provided that the company should make good any damage caused to the structure of the church at any time after the completion of the railway in consequence of the construction, user, or want of repair thereof. The amount of compensation to be paid by the company for the surface taken by them and for the subsoil and crypt and all other matters in difference were to be determined by an arbitrator. The company took the land, other than the site of the church, and constructed a station under the church. On an award of an arbitrator stated in the form of a special case:—

Held (affirming the judgment of Wright J.), that there being nothing in the special Act to exclude the operation of the Union of Benefices Act, 1860, and no inference that it was intended to exclude the operation of s. 63 of the Lands Clauses Act, 1845, arising either by intendment or by the express inclusion of s. 85 of that Act, and the easement being specifically mentioned as the subject of compensation, the arbitrator was entitled to assess compensation under s. 63 of the Lands Clauses Consolidation Act, 1845, in respect of severance or the injurious affecting of other lands, on the basis that although the lands not taken by the company were the site of a church, they might at some future time cease to be so, and be available for building, and that he was at liberty to draw his own conclusions as to when that time would be likely to arrive. *In re* CITY AND SOUTH LONDON RAILWAY COMPANY AND THE RECTOR AND CHURCHWARDENS OF ST. MARY WOOLNOTH AND ST. MARY WOOLCHURCH HAW C. A. 728

LANDS CLAUSES ACTS—*continued.*

2. —— *Notice of Intention to summon Jury—Purchase-money and Compensation—Offer by Promoters — Time for Acceptance — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 38, 51.

Where in a proceeding to take and purchase lands under the Lands Clauses Consolidation Act, 1845, the promoters have given notice under s. 38 of their intention to summon a jury, and have therein stated the sum which they are willing to give as and for purchase-money and compensation, and, the offer not having been accepted, a jury is summoned, the claimant is entitled at any time before the verdict of the jury is given to accept the offer of the promoters, and the jury should in such a case be directed to return a verdict for the amount of the offer. THE KING *v.* HIGH BAILIFF OF WESTMINSTER. *Ex parte* LONDON COUNTY COUNCIL **Div. Ct. 189**

—— Poor-rate, Deficiency in assessment to—Liability of promoters of undertaking *See* LONDON. 2. **354**

LEASE.

See under LANDLORD AND TENANT.

—— Purchase of lease—Unusual and onerous covenants—Duty of vendor—Constructive notice - - - - **487**
See VENDOR AND PURCHASER.

LEVEL CROSSING—Road raised on inclined planes—Repair of roadway - **394**
See RAILWAY. 1.

LIBEL—Fair comment—Literary work—Withdrawal of case from jury - - **100**
See DEFAMATION.

LICENCE.

See under LICENSING ACTS.

LICENSING ACTS—*Renewal—Alehouse—Licence for Sale of Excisable Liquors—Change of Occupancy—Expiration of Licence—Subsequent Removal—New Tenant—Application for Licence—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14.

The Alehouse Act, 1828, enacts, with regard to persons duly licensed under that Act, "If any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence," the justices may grant a licence to any new tenant or occupier of any house having so become unoccupied.

The tenant of an alehouse who was duly licensed under the Alehouse Act, 1828, applied for a renewal of his licence, which was refused. He continued in occupation of the house after his licence had expired, and then removed. A new tenant took possession of the premises, and applied for a licence under s. 14 of the Alehouse Act, 1828. The justices refused the application on the ground that, as the outgoing tenant was not licensed at the time of his removal, they had no jurisdiction to entertain the application:—

Held, affirming a judgment of the King's Bench Division, that the decision of the justices was right.

Simpkin v. *Birmingham Justices*, (1872) L. R. 7 Q. B. 482, approved. REX *v.* LONDON COUNTY JUSTICES - - - **C. A. 19**

LICENSING ACTS—*continued.*

—— Whist—Absence of element of wagering *See* GAMING. **428**

LIFE INSURANCE.

See under INSURANCE, LIFE.

LIMITATIONS, STATUTE OF — Set-off — Payment—Solicitor's bill - - **317**
See APPROPRIATION.

—— Street — Paving expenses — Apportioned amount—Demand - - - **1**
See LONDON. 3.

LIVERPOOL—Liverpool Court of Passage—Interpleader issue—New trial - **140**
See BILL OF SALE.

LOCAL GOVERNMENT—*By-law — Reasonableness—Rural District — Discretion of Justices—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

A rural sanitary authority, invested with urban powers, made a by-law under s. 157 of the Public Health Act, 1875, prohibiting the erection within their district of a new building not constructed of brick, stone, or other hard and incombustible material:—

Held, that the fact that the by-law did not reserve to the sanitary authority any power to exempt exceptional cases from its operation, as for instance where the building was remote from other dwellings and had all its rooms on the ground floor, did not make the by-law unreasonable and void; but that if, upon the hearing of an information for a breach of the by-law, the justices were of opinion that, having regard to the purposes for which the by-law was made, it was not necessary to enforce it under the special circumstances of the case, they might in the exercise of their discretion under s. 16 of the Summary Jurisdiction Act, 1879, notwithstanding that a breach of the by-law had in fact been committed, dismiss the information or impose only a nominal penalty. SALT *v.* SCOTT HALL **Div. Ct. 245**

2. —— *Inspection by Local Authority—Admission to Private Premises—Right of Entry without Permission of Occupier—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 102, 306.

Sect. 102 of the Public Health Act, 1875, provides that a local authority or any of their officers "shall be admitted into any premises for the purpose of examining as to the existence of any nuisance thereon," and if admission is refused application may be made to a magistrate for an order to admit.

By s. 306, any person who wilfully obstructs any member of a local authority in the execution of the Act is liable to a penalty.

Members of the appellant council, purporting to act under s. 102, entered a yard on the respondent's premises in his absence without having first requested or obtained his permission so to do, and, while there, were locked in by the respondent:—

Held, that s. 102 does not authorize an entry on private premises without the permission of the occupier being first requested; that the members of the appellant council while on the premises of the respondent were, therefore, not engaged in the

LOCAL GOVERNMENT—*continued.*
execution of the Act; and that the respondent had not committed an offence under s. 306. Consett Urban District Council *v.* Crawford
Div. Ct. 183

LONDON—*Buildings—Party Wall—Expense of Raising — Building Notice — Difference between adjoining Owners—Arbitration—Jurisdiction of Arbitrators—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 88, 90, 91, 95.

The owners of a house in London made an addition to it which involved the raising of the party wall between it and the adjoining house. They afterwards let the house to the appellant for twenty-one years. Some time after the respondent, who was the owner of the adjoining house, pulled it down and rebuilt it, thereby using the party wall to a greater extent than before the alteration. The respondent having given notice to the appellant of his intention to do the work under s. 90 of the London Building Act, 1894, and the appellant not having consented thereto, a difference thereupon arose between the respondent, as building owner, and the appellant, as adjoining owner, within the meaning of s. 90 of the Act. Arbitrators having been appointed to settle that difference under s. 91 of the Act, they by their award (inter alia) directed payment by the respondent to the appellant of a sum of money in respect of the extended use by the respondent of the party wall:—

Held, that the appellant was not, as tenant of the first-mentioned house, entitled to any such payment, and that the arbitrators, in awarding such a payment, had acted beyond their jurisdiction, and consequently pro tanto their award was invalid. *In re* Stone and Hastie - C. A. 463

2. —— *Rates—Poor-rate—Lands taken Compulsorily—Deficiency in Assessment to Poor-rate—Liability of Promoters of Undertaking—General Rate—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 10, *sub-s.* 2.

By s. 133 of the Lands Clauses Consolidation Act, 1845, promoters of undertakings to whom that Act applies who become possessed of lands liable to be assessed to the poor-rate are to make good the deficiency in that rate caused by their taking or using the lands for the purposes of their works until their works are completed and assessed to the poor-rate.

By s. 10, sub-s. 2, of the London Government Act, 1899, the general rate and the poor-rate are to be assessed, made, and levied together by the borough council as one rate, termed the general rate, which is to be assessed, made, collected, and levied as if it were the poor-rate, and all enactments referring to the poor-rate are (subject to the provisions of the Act as to audit) to be construed as referring also to the general rate:—

Held, that promoters who in the exercise of their statutory powers had compulsorily taken land in London since the coming into operation of the London Government Act, 1899, were only liable to make good the deficiency in so much of the general rate as represented the poor-rate or anything chargeable on that rate, and were not liable to make good the whole of the deficiency in the general rate.

LONDON—*continued.*
Decision of Wright J., [1902] 2 K. B. 701, affirmed. Islington Borough Council *v.* London School Board - - - C. A. 354

3. —— *Streets—New Street—Paving Expenses—Owner of House—Action to recover Apportioned Amount — Demand — Statute of Limitations—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

In 1891 a vestry paved a new street in the metropolis and apportioned the expenses; in the same year they demanded payment of an apportioned part of the expenses from the then owner of a house in the street, but he did not pay. In 1896 the defendant became owner of the house, and in 1898 the vestry demanded payment of the amount from him. In an action brought in 1903 to recover the amount:—

Held, that, under s. 105 of the Metropolis Management Act, 1855, as amended by s. 77 of the Act of 1862, an action would lie to recover the apportioned part of the expenses, and that the Statute of Limitations would not begin to run in favour of the defendant, if at all, until payment was demanded from him. Hampstead Corporation *v.* Caunt - - Wright J. 1

—— Mayor's Court.
See under Mayor's Court.

MAINTENANCE—Shipwreck—"Distressed seamen"—Expenses of maintenance, &c., abroad - - - - 324
See Shipping. 4.

MALICE—Action, Cause of—Interference with legal right—Justification—"Stop-day"
See Trade Union. 2. 545

MALICIOUS DAMAGE—Shooting at dog—Malicious injury to property - - 714
See Criminal Law. 1.

MARINE INSURANCE.
See Cases under Insurance, Marine.

MARRIED WOMAN.
See under Husband and Wife.

MASTER—Appeal from—Security, Decision of master as to sufficiency of - 359
See Practice. 1.

MASTER AND SERVANT.
See under Employer and Workman.

MAYOR'S COURT—*Practice—Taxation of Costs—Solicitor and Client—Amount recovered under* 50*l.—Certificate by Judge for Costs on Higher Scale—Rule* 13 *of the Mayor's Court Rules*, 1890.

Where, in an action in the Mayor's Court for 40*l.*, the plaintiff succeeded, and the judge, under rule 13 of the Mayor's Court Rules, 1890, certified for costs on the Mayor's Court Scale applicable to cases in which an amount of or exceeding 50*l.* has been recovered:—

Held, that, upon taxation of the bill delivered by the defendants' solicitors in respect of their costs in the action as between them and the defendants under the Solicitors Act, 1843, the master was right in taxing upon the same scale. *In re* James Briggs & Son - - C. A. 156

MAYOR'S COURT RULES, 1890, r. 13 - 156
See MAYOR'S COURT.

MEDICINE—Stamp duty - - - 6
See REVENUE. 5.

MERCANTILE MARINE FUND—Shipwreck—"Distressed seamen"—Expenses of maintenance, &c., abroad - - 324
See SHIPPING. 4.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINE—Action, Cause of—Interference with legal right—Justification—"Stop-day" 545
See TRADE UNION. 2.

MISCONDUCT—Solicitor—Necessity of appearing by counsel - - - - 205
See SOLICITOR. 1.

MISREPRESENTATIONS — Fraudulent — Prospectus—Directors' liability - 197
See COMPANY. 3.

MOLESTATION—Interference with employment—Trade union officers, Liability of 600
See TRADE UNION. 1.

MORTGAGE — Building and fixtures — Hiring agreement—Chairs fastened to floor of place of entertainment - - 135
See FIXTURES.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAVAL REVIEW—Contract of hiring 683, 756
See CONTRACT. 6, 7.

NEGATIVE COVENANT — Lease — Proviso for re-entry - - - - 241
See LANDLORD AND TENANT. 3.

NEGLIGENCE—*Engine, Invitation to Travel on —Action for Personal Injuries—Duty to take Reasonable Care under the Circumstances—Liability for Negligence of Servants.*

The defendant was contractor for making a tunnel for a tube railway, and had constructed, for the purpose of carrying out the work, a temporary line on which an electric engine ran. This engine was used to draw trucks containing the excavated material to a spot where it could be brought to the surface. It was not fitted for passengers, and the defendant had directed that no one should be allowed to ride on it but the driver and a guard. It had, however, been used to carry officials in the employment of the defendant and of the railway company, with the knowledge and concurrence of the defendant's representative. The plaintiff was an inspector of works appointed by the engineer of the railway, and he accepted from the defendant's timekeeper, who was riding on the engine, an invitation to be conveyed by it to his destination. An accident happened while the plaintiff was on the engine, and he sustained injuries. In an action to recover damages from the defendant in respect of these injuries, the jury found that the plaintiff

NEGLIGENCE—*continued.*

was on the engine for his own convenience, but with the permission of the defendant's representative, and that the accident was due to the negligence of the defendant's servants:—

Held, that the defendant must be taken, through his representative, to have permitted the plaintiff to ride on the engine, and that his liability was that of a person who undertakes the carriage of another gratuitously; that the duty in such a case is that the care exercised must be reasonable under the circumstances; that there was evidence of such a failure of due care on the part of the defendant's servants as would make him responsible for damage arising therefrom; and that the plaintiff was entitled to judgment. HARRIS *v.* PERRY & Co. - - C. A. 219

2. — *Liability — Intervening Act of Third Party — Trespassers, Interference by — Effective Cause of Damage.*

The defendants' servants shunted some trucks and a brake-van, all coupled together, on to a siding which was on an incline running down to a level crossing over a highway. The siding had a catch-point to prevent vehicles, if set loose, from running down the incline; but, for the convenience of their shunting operations, the defendants' servants did not place the trucks and van beyond the catch-point, but screwed down their brakes, and left them in a position in which they would not have caused any damage if not interfered with. Some boys, trespassing on the siding, uncoupled the van from the trucks and released its brake, so that it ran down the incline and injured the plaintiff, who was lawfully passing along the highway over the level crossing. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with vehicles placed upon it.

At the trial of an action by the plaintiff, the jury found that the van was in a safe position as and where left by the defendants, unless interfered with afterwards; that the accident would not have happened if the van had not been interfered with; that the interference was the act of trespassers, who acted negligently; that the danger of interference causing injury was known to and could have been guarded against by the exercise of reasonable care on the part of the defendants; and that the negligence of the defendants in not placing the van beyond the catch-point was the effective cause of the accident, Upon those findings the jury assessed damages, and Kennedy J. gave judgment for the plaintiff: [1902] 1 K. B. 618.

On appeal by the defendants:—

Held, that the evidence did not support the findings of negligence on the part of the defendants; and, therefore (applying the rule in *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240, 243), as negligence on their part was not the effective cause of the accident, they were not rendered liable through the interference of trespassers. MCDOWALL *v.* GREAT WESTERN RAILWAY COMPANY - - - - - C. A. 331

—— Shipowner, Liability of—"Faults or errors in management of vessel" - 666
See SHIPPING. 1.

NEWSPAPER—Publication tending to prejudice fair trial—Jurisdiction of High Court to attach - - - - 432
See CONTEMPT OF COURT.

NOTICE — Bankruptcy—Set-off—Mutual credits—Judgment debt - - - 340
See BANKRUPTCY. 2.

—— Constructive notice—Lease, Purchase of—Unusual and onerous covenants—Duty of vendor - - - - 487
See VENDOR AND PURCHASER.

—— Party wall—Expense of raising—Building notice—Jurisdiction of arbitrators 463
See LONDON. 1.

—— Purchasers for value without notice—Title of trustee in bankruptcy - - 517
See BANKRUPTCY. 4.

"OPTION"—Exercise of—"Proceeding"—Workmen's compensation - - 639
See EMPLOYER AND WORKMAN. 3.

PARTNERSHIP—*Liability of Estate of Deceased Partner—Action for Goods sold and delivered—Goods ordered in Lifetime of Partner but delivered after his Death—"Debt or Obligation"—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 9.

The estate of a deceased partner is not liable in an action for the price of goods sold and delivered where the order for the goods is given in the lifetime of the deceased partner but delivery does not take place till after his death. BAGEL *v.* MILLER - - - - **Div. Ct. 212**

PARTY WALL—Expense of raising—Building notice—Jurisdiction of arbitrators 463
See LONDON. 1.

PASSENGER — Travelling on after giving up ticket at station for which it is available
See RAILWAY. 2. 32

PAVING—Street—Action to recover apportioned amount—Demand—Statute of Limitations - - - - - 1
See LONDON. 3.

PAYMENT—Appropriation—Statute of Limitations—Set-off - - - 317
See APPROPRIATION.

PERFORMANCE—Contract—Impossibility.
See Cases under CONTRACT.

—— Contract—Prevention by accident—Cheque, Right to recover on - - 476
See CONTRACT. 3.

PHOTOGRAPH — Copyright—Photograph taken at request of sitter - - - 227
See COPYRIGHT.

POLICY—Marine insurance.
See under INSURANCE, LIFE, and INSURANCE, MARINE.

POOR LAW — *Settlement — Illegitimate Child under Sixteen—Power of Child under Sixteen to acquire Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A child under sixteen years of age, whether legitimate or illegitimate, may while residing with its parent acquire a settlement for itself under s. 34 of the Divided Parishes Act, 1876, and does not necessarily derive its settlement from its parent.

Reg. v. *Elvet*, (1859) 2 E. & E. 266, followed.

Overseers of Manchester v. *Guardians of Ormskirk Union*, (1890) 24 Q. B. D. 678, not followed. WEST HAM UNION *v.* HOLBEACH UNION **Div. Ct. 627**

2. — *Settlement—Irremovability—Residence—"Hospital"—Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1.

An institution partially endowed by a private person and founded with the object of providing a home and medical treatment, together with suitable employment and recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within the proviso to s. 1 of the Poor Removal Act, 1846.

Judgment of the Divisional Court, [1903] 1 K. B. 19, affirmed. ORMSKIRK UNION *v.* CHORLTON UNION - - - **C. A. 498**

POOR-RATES.
See under RATES.

PRACTICE—*Appeal—Application for Judgment under Order XIV.—Condition of Leave to defend—Security to Satisfaction of Master—Decision of Master as to Sufficiency of Security—Appeal from Master—Rules of Supreme Court, Order XIV., r.* 6; *Order LIV., r.* 21.

Where under Order XIV., r. 6, leave to defend an action is given to the defendant on giving security for the amount claimed to the satisfaction of a master, there is no appeal from the decision of the master with regard to the sufficiency of the security tendered. HOARE & CO. *v.* MORSHEAD - - - **C. A. 359**

2. —— *Costs—Jurisdiction—"Good Cause"—Alternative Defendants—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Rules of the Supreme Court, Order LXV., r.* 1.

In an action in the King's Bench Division, claiming relief against the defendants in the alternative, the Court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant, or to order the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff.

The latter course should be adopted when the action is tried with a jury and the judge does not think that there is "good cause" for depriving the successful defendant of costs.

Decision of Grantham J. affirmed. SANDERSON *v.* BLYTH THEATRE COMPANY - **C. A. 533**

3. —— *Costs — Taxation — Revenue Cases—Special Case—Costs before Case put on File—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 59—*Order LXV., r.* 27, *regulation* 29—*Order LXVIII., r.* 2.

Order LXV., r. 27, regulation 29, is applicable to the costs of settling a special case for the opinion of the Court, in an appeal on the Revenue side of the King's Bench Division, incurred before the filing of the case. MANCHESTER CORPORATION *v.* SUGDEN. GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP - - - **C. A. 171**

PRACTICE—*continued.*

—— Appeal—Costs—Discretion—Trial by judge without jury - - - 756
See CONTRACT. 6.

Appeal—Summary decision of judge—Leave to appeal - - - - 277
See INTERPLEADER.

Appeal—Summary Jurisdiction (Married Women) Act—Appeal by case stated
See HUSBAND AND WIFE. 270

—— Costs—Appeal from special sessions—Jurisdiction of quarter sessions over costs before special sessions - - 178
See RATES.

—— Costs—Jurisdiction—"Good cause"—Alternative defendants - - - 533
See PRACTICE. 2.

—— Costs—Jurisdiction of quarter sessions over costs before special sessions - 178
See RATES.

—— Costs—Mayor's Court—Taxation—Certificate by judge for costs on higher scale
See MAYOR'S COURT. 156

—— Jury, Notice of intention to summon—Offer by promoters—Time for acceptance 189
See LANDS CLAUSES ACTS. 2.

—— "Proceeding" against employer—Workmen's compensation - - 639
See EMPLOYER AND WORKMAN. 3.

—— Summary Jurisdiction (Married Women) Act—Appeal by case stated - 270
See HUSBAND AND WIFE.

—— Summons, Time for return of—Sale of food and drugs - - - - 163
See ADULTERATION.

—— Third-party procedure—Directors' liability
See COMPANY. 3. 197

PREJUDICE—Receipts "without prejudice"—Workmen's compensation - - 639
See EMPLOYER AND WORKMAN. 3.

PREMIUMS.
See under INSURANCE, LIFE.

PRINCIPAL AND AGENT—*Limited Authority—Contract made by Agent in Name of Principal, but for his own Benefit—Liability of Principal.*

B., an underwriter, was employed by certain other underwriters as their agent to underwrite policies in their names and on their behalf. B., purporting to act under that authority, underwrote in their names a policy guaranteeing to the plaintiffs that a certain company would repay to the plaintiffs the amount of certain advances made by the plaintiffs to the company. At the time that B. so underwrote the said policy the company was to the knowledge of B. in fact insolvent. B. was personally interested in the company being kept afloat, and in underwriting the policy was acting for his own interests and not for the interest of his principals. The company having failed to repay the advances, the plaintiffs sought to recover from B.'s principals upon the policy:—

Held, that, having regard to the object with which B. subscribed the names of his principals to the policy, he did not underwrite it on their behalf, and that consequently, as he had exceeded his authority, they were not liable to the plaintiffs. HAMBRO *v.* BURNAND - **Bigham J.** 399

2. —— *Secret Profit—Right to retain Commission.*

An agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but is not entitled to any commission from his principal. ANDREWS *v.* RAMSAY & Co. - - - - **Div. Ct.** 635

—— Trade union, Liability of, for wrongful acts of agents - - - - 600
See TRADE UNION. 1.

PRIVATE INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

PROFIT—Secret—Commission, Right to retain
See PRINCIPAL AND AGENT. 2. 635

PROMOTERS—Misrepresentations by, in prospectus—Directors' liability - 197
See COMPANY. 3.

—— Offer by promoters—Time for acceptance—Purchase-money and compensation 189
See LANDS CLAUSES ACTS. 2.

PROSPECTUS—Misrepresentations by promoters or directors in—Directors' liability 197
See COMPANY. 3.

PUBLIC HEALTH—By-law—Reasonableness—Discretion of justices - - 245
See LOCAL GOVERNMENT. 1.

—— Entry, Right of, without permission of occupier—Inspection by local authority
See LOCAL GOVERNMENT. 2. 183

PUBLIC-HOUSE.
See under INN.

PUBLICATION—Tending to prejudice fair trial
See CONTEMPT OF COURT. 432

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUARTER SESSIONS—Jurisdiction over costs before special sessions - - 178
See RATES.

QUO WARRANTO—Remedy by—Councillor—Disqualification—Bankruptcy - 693
See CORPORATION.

RAILWAY—*Level Crossing—Road Raised on Inclined Planes—Repair of Roadway—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.

A railway company, being authorized to carry their railway across a high road upon the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under the powers conferred by s. 16 of the Railways Clauses Act, 1845:—

Held, that there was no obligation upon the railway company to repair the roadway upon the inclined planes, notwithstanding that their act in inclining its surface might have made its

RAILWAY—*continued.*
maintenance more expensive than before. West Lancashire Rural District Council *v.* Lancashire and Yorkshire Railway Company
Wright J. 394

2. —— *Passenger—Fare—Passenger travelling on after giving up Ticket at Station for which it is available.*

The defendant, intending to travel by a particular train from H. to M. on the plaintiffs' railway, took a ticket to S., an intermediate station, and after giving up this ticket on the arrival of the train at S., remained in the carriage and tendered to the plaintiffs' servants 7*d.*, which was the amount of the fare from S. to M.—the difference between the fare from H. to S. and the through fare from H. to M. being 9*d.* The plaintiffs refused the amount tendered, but allowed the defendant to travel on in the same train to M., and sued him for the excess through fare:—

Held, that the plaintiffs were entitled to recover. London and North Western Railway Company *v.* Hinchcliffe - Div. Ct. 32

—— Engine, Invitation to travel on—Liability for negligence of servants - 219
See Negligence. 1.

—— Workmen's compensation—Railway guard—Earnings—Lodging allowance 26
See Employer and Workman. 2.

RATES—*Appeal from Special Sessions—Jurisdiction of Quarter Sessions over Costs before Special Sessions—Poor-rate—Parochial Assessments Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 6.

Where, upon an appeal from special sessions under s. 6 of the Parochial Assessments Act, 1836, the quarter sessions allow the appeal, the quarter sessions have jurisdiction to set aside the order of the special sessions giving costs to the successful party at the special sessions, and also to order that the unsuccessful party at the special sessions shall be paid the costs incurred by him at the special sessions. The King *v.* Cornwall (Justices of) - - - Div. Ct. 178

—— Exemption from rates—Liability to repair ratione tenuræ - - - 445
See Highway.

—— Liability of promoters of undertaking—General rate - - - 354
See London. 2.

RECEIPTS—"Without prejudice"—Workmen's compensation - - - 639
See Employer and Workman. 3.

RE-ENTRY—Proviso for—Lease—Negative covenant - - - - - 241
See Landlord and Tenant. 3.

REGISTRATION—Innocent presentment for—Implied contract to indemnify—Forged transfer of stock - - - 580
See Company. 2.

RELEASE—Conditional—Composition—Scheme of arrangement - - - - 50
See Bankruptcy. 3.

RENEWAL—Alehouse—Change of occupancy—Application for licence - - - 19
See Licensing Acts.

RENT—Lease—Forfeiture—Subsequent payment of rent by occupier to lessee—Estoppel - - - - 304
See Landlord and Tenant. 2.

REPAIR—Highway—Exemption from rate—Liability to repair ratione tenuræ 445
See Highway.

—— Road raised on inclined planes—Level crossing - - - - - 394
See Railway. 1.

REVENUE—*Estate Duty—Policy of Life Insurance—Marriage Settlement—"Interest purchased or provided by Deceased"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, *sub-s.* 1 (*d*)—14 *Geo.* 3, *c.* 48.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act. By s. 2, "property passing on the death" is to be deemed to include (s. 2, sub-s. 1 (*d*)) "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

A father effected a policy of insurance in his own name on the life of his son, then aged eleven, to commence at the age of twenty-one, upon which ten yearly premiums only were to be paid; the father, who had no insurable interest in his son's life, paid all the premiums. After the son had attained the age of twenty-one, the father, with the approbation of the son and the son's intended wife, assigned to the trustees of the son's marriage settlement the policy of insurance and all moneys assured or to become payable under it upon trust after the son's death to invest the insurance moneys and pay the income to the wife for life. After the death of the son (who survived his father) the insurance moneys were paid by the insurance company to the trustees, who invested them in accordance with the trusts of the settlement:—

Held, that the sum paid under the insurance policy on the son's death was an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of s. 2, sub-s. 1 (*d*), and that on the death of the son estate duty was payable in respect of that sum.

Attorney-General v. *Dobree*, [1900] 1 Q. B. 442, and *Attorney-General* v. *Robinson*, [1901] 2 K. B. 67, followed.

Held, further, that, assuming that as between the father and the insurance company the policy was illegal and void under 14 Geo. 3, c. 48, for want of insurable interest, and that the insurance moneys were not legally recoverable, yet, the money having been in fact paid by the insurance company, the liability to estate duty was not affected by the illegality of the contract of insurance.

Worthington v. *Curtis*, (1875) 1 Ch. D. 419, discussed. Attorney-General *v.* Murray
Ridley J. 64

2. — *Excise—Spirits—Extraction of Spirits from Wood of Empty Cask—Possession of Spirits*

naturally exuding from Wood of Cask—"*Extracted*"—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 4, *sub-s.* 1.

By s. 4, sub-s. 1, of the Finance Act, 1898, "A person shall not (*a*) subject any cask to any process for the purpose of extracting any spirits absorbed in the wood thereof; or (*b*) have on his premises any cask which is being subjected to any such process, or any spirits extracted from the wood of any cask":—

Held, that, in order to convict of the offence of having on the premises spirits extracted from the wood of a cask, the spirits must have been extracted either by an active process intentionally applied to the cask for that purpose, or by allowing the cask to remain in a position where it would be affected by the external temperature, with the knowledge that the temperature would cause the spirits to exude from the wood and collect in the bottom of the cask; but that the innocent possession of spirits which had, owing to the operation of natural causes and without any intent on the part either of the owners or of their servants, exuded from the wood and collected at the bottom of the cask did not amount to the possession of spirits "extracted" from the wood of the cask within the meaning of the section:

Held, further, that the owners of the cask would be liable under the section for the intentional act of their servants, though committed without their own knowledge or approval. ROBINSON BROTHERS *v.* DIXON - **Div. Ct. 701**

3. —— *Income Tax—Sched. D—Bank—Purchase of Business of another Bank—Establishment of Branch—Succession to Business—Business* "*set up and commenced*"—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35, *s.* 100), *Sched. D—First and Second Cases*, *rule* 4; *First Case*, *rule* 1.

The respondents were a banking company with a head office in London at which the general affairs of the company were transacted and with numerous branches, the working of which was regulated and supervised from the head office by a board of directors and a general manager. The ultimate profits divisible among the shareholders were the result of the trading of the company as a whole, irrespective of the profit or loss arising from a particular branch. The respondents acquired by purchase the whole of the business and the premises of a country bank, and opened the premises as a branch of their business; the profits, if any, made at that branch were merged in the general profits of the respondents' business, and it was impossible to ascertain the proportion of increase or decrease, if any, in those profits arising from the purchase. The respondents had not previously to the purchase had a branch or carried on any business in the town where the premises of the country bank were situate. Assessments for income tax for the three years following the purchase were made on the respondents on their own returns at their head office based on the average profits of the whole of their business for the three preceding years, and the assessments included the profits, if any, made by the new branch, but it was impossible to differentiate between those profits and the general profits of the respondents' business.

Additional assessments were made on the respondents for the said three years on assumed profits made by them, based as to the first of the three years on the average profits of the country bank for the three years preceding the purchase, and as to the second year on one-third of the profits of the two years preceding the purchase, and as to the third year on one-third of the profits of the year preceding the purchase:—

Held, that there had not been a succession by the respondents to the business of the country bank within rule 4 of the first and second cases, Sched. D, s. 100, of 5 & 6 Vict. c. 35; that the new branch was not a business which had been set up and commenced within three years of the years of assessment within rule 1 of the first case; that the business carried on by the respondents at the premises of the country bank was their former business enlarged by the acquisition of the country bank; and that the respondents were, therefore, not liable to the additional assessments. BELL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED - - **Ridley J. 249**

4. —— *Stamp Duty—Company—Consolidation of Debenture Stock—Issue of Loan Capital—Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

By the special Act of the defendant company, three different debenture stocks of the company, being respectively 3 per cent., 4 per cent., and 4½ per cent. stock, and amounting to 411,852*l.*, were extinguished, and in lieu thereof there was created a new 3 per cent. debenture stock. The holders of the original 3 per cent. stock received the same nominal amount of the new stock, and the holders of the 4 per cent. and 4½ per cent. stocks received new stock to such nominal amount as at the rate of 3 per cent. would yield to the holder the same amount as was payable in respect of the stock previously held. The amount of the new debenture stock requisite to carry out the Act was 529,136*l.*, and stock to this amount was inscribed in the names of the persons entitled thereto, and certificates were issued in exchange for the old certificates:—

Held, that the company had not proposed to "issue any loan capital" within the meaning of s. 8 of the Finance Act, 1899, and that the stamp duty imposed by that section was not payable. ATTORNEY-GENERAL *v.* REGENT'S CANAL AND DOCK COMPANY - - - **Ridley J. 86**

5. —— *Stamp Duty—Medicinal Preparations—Recommendation as a Remedy by Retail Chemist*—"*Owner, Proprietor . . . . original or first Vendor*"—52 *Geo.* 3, *c.* 150, *Schedule.*

A retail chemist who purchases a preparation of medicinal drugs from the manufacturers or from other persons, and himself attaches to the bottles in which he retails it a label recommending it as a remedy for certain specified human ailments, is not the "owner, proprietor . . . . original or first vendor thereof," within the meaning of 52 Geo. 3, c. 150, Schedule—Special Exemptions; and if the preparation at the time that he so purchased it was exempt from stamp duty, the fact of his attaching the said label will not deprive it of the exemption. FARMER *v.* GLYN-JONES - - - - **Div. Ct. 6**

6. —— *Succession Duty—Disentailing Deed*—

REVENUE—*continued.*

Appointment to Purchaser in Fee — Alienation — Succession derived from Alienee — Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

In 1868 the tenant for life of real estate and the tenant in tail in remainder joined in the execution of a disentailing deed by which the property stood limited to such uses as they should by deed jointly appoint. In 1870 they sold a portion of the land to a purchaser, to whom they jointly appointed and conveyed it. In 1874 the purchaser died, having devised the land to his wife, who died in 1888, after devising it to her daughter; the daughter paid succession duty on the value of her interest considered as an annuity. In 1899 the tenant for life died:—

Held, that upon the death of the tenant for life the succession duty in respect of the succession of the tenant in tail became payable, notwithstanding the alienation of the succession and the disposition of the property by the alienee.

In re Cooper and Allen to Harlech, (1876) 4 Ch. D. 802, not followed. ATTORNEY-GENERAL *v.* DUKE OF NORTHUMBERLAND - **Ridley J. 71**

—— Costs—Revenue cases—Special case—Costs before case put on file - - 171
See PRACTICE. 3.

—— Stamp, Insufficient—Shares—Transfer—Refusal to register—Right to go behind that which appears in document - 121
See COMPANY. 4.

ROAD—Repair of—Level crossing—Road raised on inclined planes - - - 394
See RAILWAY. 1.

RULES OF SUPREME COURT:—**Order XIV., r. 6**—*Leave to sign Judgment and defend where Writ specially indorsed* - 359
See PRACTICE. 1.

—— **Order LIV., r. 21**—*Applications and Proceedings at Chambers* - - 359
See PRACTICE. 1.

—— **Order LVII., rr. 9, 11**—*Interpleader* - 277
See INTERPLEADER.

—— **Order LXV., r. 1**—*Costs* - - 756
See CONTRACT. 6.

—— —— —— - - - - 533
See PRACTICE. 2.

—— —— **r. 27, Regulation 29** - - 171
See PRACTICE. 3.

—— **Order LXVIII., r. 2**—*Application of Rules in Crown, &c., Cases* - - - 171
See PRACTICE. 3.

SALE—Food and drugs.
See under ADULTERATION.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SALE OF GOODS—*Implied Warranty—Fitness for particular Purpose — Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 1.

The particular purpose for which an article purchased is required may, under the Sale of Goods Act, 1893, s. 14, be made known to the seller by the recognised description by which the article is purchased.

The question whether, on a sale of goods, the buyer made known to the seller the purpose for which the goods were required so as to shew that he relied on the seller's skill or judgment is one of fact depending on the circumstances of the particular case.

The plaintiff, a draper, went to the shop of the defendant, a retail chemist, and asked for a "hot-water bottle." An article was shewn to him as such. He inquired whether it would stand boiling water, and the defendant told him that it was meant for hot water, but would not stand boiling water. He then purchased it. Some days afterwards the bottle, while in use by the plaintiff's wife, burst, and she was in consequence scalded. The plaintiff sued the defendant as for breach of a warranty that the bottle was fit for use as a hot-water bottle. The jury found at the trial that it was not, when sold, fit for that purpose, and that this was the cause of its bursting. The judge, to whom power was given by consent to draw any inferences of fact, if necessary, on further consideration, found that the plaintiff had, when purchasing the bottle, made known to the defendant the particular purpose for which it was required, so as to shew that he relied on the skill and knowledge of the defendant; and held that the case therefore came within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and there was, consequently, an implied warranty that the bottle was fit for the purpose of holding hot water, of which there had been a breach. He therefore gave judgment for the plaintiff:—

Held, that the facts justified the conclusion arrived at by the judge. PREIST *v.* LAST **C. A. 148**

—— Distress—Purchase by landlord of goods distrained - - - - 168
See LANDLAND AND TENANT.

SEAMAN—Desertion—Forfeiture of wages—Deduction by consent - - 453
See SHIPPING. 3.

—— Shipwreck—"Distressed seamen"—Expenses of maintenance, &c., abroad 324
See SHIPPING. 4.

SEAWORTHINESS—Warranty of—Steamship insufficiently provided with coal - 657
See INSURANCE, MARINE. 2.

SECRET PROFIT—Right to retain commission
See PRINCIPAL AND AGENT. 2. **635**

SECURED CREDITOR—Payment of money into court to "account of sequestrators"—Bankruptcy of defendant—Title of trustee - - - - 41
See BANKRUPTCY. 5.

SECURITY—Decision of master as to sufficiency of—Appeal from master - - 359
See PRACTICE. 1.

SEPARATION ORDER—Adultery of wife—Liability of husband for subsequent weekly payments - - - 270
See HUSBAND AND WIFE.

SEQUESTRATION—Payment of money into court to "account of sequestrators"—Bankruptcy of defendant—Title of trustee 41
See BANKRUPTCY. 5.

SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SET-OFF—Bankruptcy notice—Mutual credits—Judgment debt - - - 340
See BANKRUPTCY. 2.

—— Debentures—Floating security—Rights of second debenture-holders - - 367
See COMPANY. 1.

—— Payment—Statute of Limitations—Solicitor's bill - - - - 317
See APPROPRIATION.

SETTLEMENT (POOR LAW)—Illegitimate child under sixteen—Power of child under sixteen to acquire settlement - 627
See POOR LAW. 1.

—— Poor removal—Irremovability—Residence—Hospital - - - - 498
See POOR LAW. 2.

SEVERANCE—Lands Clauses Act—Compensation—Site of a church - - 728
See LANDS CLAUSES ACTS. 1.

SHIPPING—*Bill of Lading—Cargo—Refrigerating Apparatus—Part of Ship—Negligence—Damage—Shipowner, Liability of—"Faults or Errors in Management of Vessel"—Ship—Carriage by Sea—Harter Act (Act of Congress of U.S.A.* 1893), *ss.* 1, 2, 3.

Butter was shipped on board the defendants' steamship at New York for carriage to London under bills of lading which incorporated the Act of Congress known as the "Harter Act," by s. 3 of which it is provided that, subject to the conditions therein named, the owner of the ship shall not be "held responsible for damage or loss resulting from faults or errors . . . . in the management of said vessel." The butter was carried in four out of six insulated chambers forming part of refrigerating apparatus bolted to the ship and connected with her engines, the other two chambers being used for the ship's provisions during the voyage. The butter was delivered in London in a damaged condition, resulting from the negligence of one of the ship's engineers in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high:—

Held, upon the facts, and especially as the refrigerating apparatus was used for the ship's provisions and not exclusively for the butter, that the apparatus must be regarded as being part of the ship, and that therefore the mismanagement of the apparatus was mismanagement of the ship, so that the neglect to keep the chambers sufficiently cooled during the voyage was a fault or error "in the management of said vessel" within the meaning of the bills of lading, and that the defendants were consequently excused.

Decision of Kennedy J., [1903] 1 K. B. 114, affirmed. ROWSON *v.* ATLANTIC TRANSPORT COMPANY - - - - - C. A. 666

2. —— *Bill of Lading—Construction—Liability of Shipowner—Exceptions—"Unseaworthiness"—Unfitness of Ship to carry Cargo.*

A bill of lading of sheepskins exempted the shipowners from liability (inter alia) "for loss or damage resulting from the consequence of any injury to or defect in hull, tackle, or machinery . . . . however such defect or injury may be caused, and notwithstanding that the same may have existed at or at any time before the loading or sailing of the vessel . . . . and whether . . . . the loss or injury arising therefrom be occasioned by the . . . . negligence of the . . . . owners, masters, officers . . . . crew, and whether before, or after, or during the voyage, or for whose acts the shipowner would otherwise be liable, or by unseaworthiness of the ship at the beginning or at any period of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness." Some of the sheepskins were damaged by fresh water which escaped from a pipe which was broken at the time when the cargo was loaded.

In an action by the indorsees of the bill of lading against the shipowners for the damage to the sheepskins, the defendants admitted that the vessel was not fit to receive cargo at the time when the sheepskins were loaded, and that reasonable means had not been taken to provide against that unfitness, but the defendants claimed exemption from liability under the terms of the bill of lading:—

Held, by the Court of Appeal, that the clause relating to unseaworthiness did not create an additional exception, but was a qualification of the prior exceptions; that it included unfitness of the ship to receive the cargo; and that, as the shipowners had not taken reasonable means to provide against that unfitness, they were liable for the loss.

Decision of Wills J., (1902) 8 Com. Cas. 1, reversed.

Primâ facie the term "unseaworthiness" in a bill of lading includes unfitness of the ship to carry the cargo as well as unfitness to encounter the perils of navigation. RATHBONE BROTHERS & Co. *v.* D. MACIVER, SONS & Co. - C. A. 378

3. —— *Seaman—Desertion—Forfeiture of Wages—Deduction by Consent—Payment through or in presence of Superintendent—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 131, 221, 232.

A seaman deserted from a ship at a foreign port, thereby committing an offence under s. 221 of the Merchant Shipping Act, 1894, which rendered him liable to forfeit his wages then due and subsequently earned, and to satisfy any excess of wages paid by the owners to a substitute at a higher rate. The seaman returned to the United Kingdom in another ship of which the appellant was master. In order to escape a prosecution for desertion by the owners of the first ship, the seaman agreed to have deducted from the wages earned on the homeward voyage the extra expense which had been incurred by them in providing a substitute after his desertion. The superintendent of mercantile marine before whom the seaman was being discharged refused to be present at the payment of the wages on the ground that the deduction was illegally made. The balance due to the seaman after making the deduction was paid to him by the appellant in the absence of the superintendent.

SHIPPING—*continued.*

The appellant was summoned under s. 131 of the Merchant Shipping Act, 1894, for having paid the wages otherwise than "through or in the presence of the superintendent," and was convicted:—

Held, that the conviction was right; that there is no power to make a deduction from a seaman's wages on the ground of forfeiture after desertion, although with the consent of a seaman, except under an order of a Court of competent jurisdiction. KESLAKE *v.* BOARD OF TRADE **Div. Ct. 453**

4. —— *Seamen—Shipwreck—"Distressed Seamen"—Expenses of Maintenance, &c., Abroad—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190, 191, 193—*Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 4.

A seaman who is shipwrecked abroad from a British ship is a "distressed seaman" within the meaning of ss. 191, 193 of the Merchant Shipping Act, 1894, and s. 4 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, notwithstanding that he has in his possession money of his own which is more than sufficient to maintain him and provide him with a passage home.

In proceedings by the Board of Trade to recover from a shipowner expenses incurred in the maintenance and relief of distressed seamen abroad, the production of the account of those expenses, and proof of payment of that account by or on behalf of the Board of Trade, are, by s. 193, sub-s. 3, of the Merchant Shipping Act, 1894, made conclusive evidence of their right to recover. BOARD OF TRADE *v.* SAILING SHIP "GLENPARK," LIMITED - - **Bigham J. 324**

—— Contract of hiring—Naval review **683, 756**
See CONTRACT. 6, 7.

—— Insurance, Marine.
See under INSURANCE, MARINE.

SHIPWRECK—"Distressed seamen"—Expenses of maintenance, &c., abroad - **324**
See SHIPPING. 4.

SHOOTING—At dog—Malicious injury to property - - - - - **714**
See CRIMINAL LAW. 1.

SOLICITOR—*Misconduct, Allegation of Professional—Inquiry—Report of Committee of Incorporated Law Society—Right of Complainant to be heard by Court—Necessity of appearing by Counsel—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.

Sect. 13 of the Solicitors Act, 1888, by which an application to strike the name of a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their findings in the form of a report to the High Court of Justice, provides that any person, who but for the Act would have been entitled to apply to the Court to strike a solicitor off the rolls, or to require him to answer allegations contained in an affidavit, shall still be entitled so to apply, and "shall be entitled to be heard, if the society brings the report of the committee before the Court":—

Held, affirming the decision of a Divisional Court, [1903] 1 K. B. 857, that such an applicant

SOLICITOR—*continued.*

could not be heard in person, but must appear by counsel.

Ex parte Pitt, (1833) 2 Dowl. 439; 39 R. R. 734, followed. *In re* A SOLICITOR - **C. A. 205**

2. —— *Striking off Roll—Permitting unqualified Person to use Solicitor's Name—Punishment—Discretion of Court—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

Sect. 32 of the Solicitors Act, 1843, which enacts that a solicitor "shall and may be" struck off the roll for certain specified offences, does not give the Court a discretion to inflict upon the offending solicitor any less punishment than that of striking him off the roll.

In re Kelly, [1895] 1 Q. B. 180, approved and followed. *In re* BURTON AND BLINKHORN **Div. Ct. 300**

—— Costs—Taxation—Mayor's Court - **156**
See MAYOR'S COURT.

—— Payment—Statute of Limitations—Set-off—Solicitor's bill - - - **317**
See APPROPRIATION.

SPECIAL CASE—Costs—Taxation—Revenue cases—Costs before case put on file **171**
See PRACTICE. 3.

SPIRITS—Excise—Extraction of spirits from wood of empty cask - - **701**
See REVENUE. 2.

STAMP DUTY.
See under REVENUE.

STATUTES:—

I.—IMPERIAL STATUTES.

21 Jac. 1, c. 16—*Statute of Limitations* - **1**
See LONDON. 3.

13 Eliz. c. 5—*Fraudulent Conveyances* - **517**
See BANKRUPTCY. 4.

2 Will. & M. Sess. 1, c. 5, s. 6 - - **168**
See LANDLORD AND TENANT. 1.

14 Geo. 3, c. 48—*Life Assurance* - **64**
See REVENUE. 1.

52 Geo. 3, c. 150, Schedule—*Medicine Stamp Act* - - - - **6**
See REVENUE. 5.

9 Geo. 4, c. 61, s. 14—*Alehouses* - - **19**
See LICENSING ACTS.

5 & 6 Will. 4, c. 50, s. 33—*Highways* - **445**
See HIGHWAY.

6 & 7 Will. 4, c. 96, s. 6—*Parochial Assessments* **178**
See RATES.

5 & 6 Vict. c. 35, s. 100, Sched. D—First and Second Cases, r. 4; First Case, r. 1—*Income Tax* - - - **249**
See REVENUE. 3.

6 & 7 Vict. c. 73, s. 32—*Solicitors* - **300**
See SOLICITOR. 2.

8 & 9 Vict. c. 18, ss. 38, 51—*Lands Clauses* **189**
See LANDS CLAUSES ACTS. 2.

—— —— s. 63 - - - - **728**
See LANDS CLAUSES ACTS. 1.

—— —— s. 133 - - - - **354**
See LONDON. 2.

8 & 9 Vict. c. 20, s. 16—*Railways Clauses* **394**
See RAILWAY. 1.

STATUTES—*continued.*

9 & 10 Vict. c. 66, s. 1—*Poor Removal* - 498
See POOR LAW. 2.

16 & 17 Vict. c. 51, ss. 2, 15—*Succession Duty* 71
See REVENUE. 6.

18 & 19 Vict. c. 120, s. 105—*Metropolis Management* - - - - - - 1
See LONDON. 3.

23 & 24 Vict. c. 126, s. 17—*Common Law Procedure* - - - - 277
See INTERPLEADER.

23 & 24 Vict. c. 142—*Union of Benefices* 728
See LANDS CLAUSES ACTS. 1.

24 & 25 Vict. c. 97, s. 41—*Malicious Damage* 714
See CRIMINAL LAW. 1.

25 & 26 Vict. c. 68, s. 1—*Fine Arts Copyright* 227
See COPYRIGHT.

25 & 26 Vict. c. 102, s. 77—*Metropolis Management* - - - - - - 1
See LONDON. 3.

35 & 36 Vict. c. 94, s. 17—*Licensing* - 428
See GAMING.

38 & 39 Vict. c. 55, ss. 102, 306—*Public Health* 183
See LOCAL GOVERNMENT. 2.

—— —— s. 157 - - - - - 245
See LOCAL GOVERNMENT. 1.

39 & 40 Vict. c. 61, ss. 34, 35—*Divided Parishes* 627
See POOR LAW. 1.

41 & 42 Vict. c. 31, s. 10, sub-s. 2—*Bills of Sale* 140
See BILL OF SALE. 1.

43 & 44 Vict. c. 19, s. 59—*Taxes Management* 171
See PRACTICE. 3.

45 & 46 Vict. c. 39, s. 3, sub-s. 1—*Conveyancing* 487
See VENDOR AND PURCHASER.

45 & 46 Vict. c. 43, ss. 4, 6, 9—*Bills of Sale* 140
See BILL OF SALE. 1.

—— —— s. 9 - - - - - 216
See BILL OF SALE. 2.

45 & 46 Vict. c. 50, ss. 12, 87—*Municipal Corporations* - - - - 693
See CORPORATION.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*); s. 38—*Bankruptcy* - - - 340
See BANKRUPTCY. 2.

—— —— s. 4, sub-s. 1 (*b*); ss. 43, 44, 49 517
See BANKRUPTCY. 4.

—— —— ss. 9, 45 - - - - - 41
See BANKRUPTCY. 5.

—— —— s. 25 - - - - - 164
See BANKRUPTCY. 1.

—— —— s. 32 - - - - - 693
See CORPORATION.

51 & 52 Vict. c. 43, s. 154—*County Courts* 37
See COUNTY COURT.

51 & 52 Vict. c. 65, s. 13—*Solicitors* - 205
See SOLICITOR. 1.

53 & 54 Vict. c. 39, s. 9—*Partnership* - 212
See PARTNERSHIP.

53 & 54 Vict. c. 44, s. 5—*Judicature* - 756
See CONTRACT. 6.

—— —— - - - - - - 533
See PRACTICE. 2.

53 & 54 Vict. c. 64, ss. 3, 5—*Directors Liability* 197
See COMPANY. 3.

STATUTES—*continued.*

53 & 54 Vict. c. 71, s. 3—*Bankruptcy* - 50
See BANKRUPTCY. 3.

54 & 55 Vict. c. 39, s. 14, sub-s. 4; s. 17—*Stamps* - - - - 121
See COMPANY. 4.

56 & 57 Vict. c. 37, s. 10—*Liverpool Court of Passage* - - - - 140
See BILL OF SALE. 1.

56 & 57 Vict. c. 71, s. 14, sub-s. 1—*Sale of Goods* - - - - 148
See SALE OF GOODS.

57 & 58 Vict. c. 16, s. 5—*Supreme Court of Judicature—Procedure* - - 277
See INTERPLEADER.

57 & 58 Vict. c. 30, s. 1; s. 2, sub-s. 1 (*d*)—*Finance Act* - - - - 64
See REVENUE. 1.

57 & 58 Vict. c. 60, ss. 131, 221, 232—*Merchant Shipping* - - - - 453
See SHIPPING. 3.

—— —— ss. 190, 191, 193 - - 324
See SHIPPING. 4.

57 & 58 Vict. c. ccxiii., ss. 88, 90, 91, 95—*London—Building* - - - 463
See LONDON. 1.

58 & 59 Vict. c. 39, ss. 7, 9, 11—*Summary Jurisdiction—Married Women* - 270
See HUSBAND AND WIFE.

60 & 61 Vict. c. 37, s. 1, sub-s. 1—*Workmen's Compensation* - - - 718
See EMPLOYER AND WORKMAN. 1.

—— —— s. 6 - - - - - 639
See EMPLOYER AND WORKMAN. 3.

—— —— Sched. I. (1) (*a*), (*i*) - - 26
See EMPLOYER AND WORKMAN. 2.

61 & 62 Vict. c. 10, s. 4, sub-s. 1—*Finance* 701
See REVENUE. 2.

61 & 62 Vict. c. 44, s. 4—*Merchant Shipping—Mercantile Marine Fund* - - 324
See SHIPPING. 4.

62 & 63 Vict. c. 9, s. 8—*Finance Act* - 86
See REVENUE. 4.

62 & 63 Vict. c. 14, s. 10, sub-s. 2—*London Government* - - - - 354
See LONDON. 2.

62 & 63 Vict. c. 51, s. 19, sub-s. 2—*Sale of Food and Drugs* - - - - 163
See ADULTERATION.

1 Edw. 7, c. 22, s. 49, Sched. II., clause 4—*Factories and Workshops* - - 707
See FACTORY ACTS. 2.

—— —— s. 149, sub-s. 1; Sched. VI., Part I., clause 20 - - - - 483
See FACTORY ACTS. 1.

1 Edw. 7, c. 27, s. 2—*Intoxicating Liquors—Sale to Children* - - - 264
See CRIMINAL LAW. 2.

II. FOREIGN STATUTES.

Harter Act (Act of Congress of U.S.A. 1893), ss. 1, 2, 3 - - - - 666
See SHIPPING. 1.

STREETS—Paving expenses—Action to recover apportioned amount—Demand—Statute of Limitations - - - 1
See LONDON. 3.

STRIKING OFF ROLL—Punishment—Discretion of Court - - - - 300
See SOLICITOR. 2.

SUCCESSION DUTY—Disentailing deed—Succession derived from alienee - 71
See REVENUE. 6.

SUMMARY — Decision of judge — Leave to appeal—Practice - - - 277
See INTERPLEADER.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMONS—Time for return of—Sale of food and drugs - - - - 163
See ADULTERATION.

TAXATION—Costs.
See under PRACTICE.

TAXES.
See under REVENUE.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

THIRD PARTIES—Intervening act of third party — Liability — Trespassers, Interference by—Effective cause of damage
See NEGLIGENCE. 2. 331

—— Lease—Forfeiture—Subsequent payment of rent by occupier to lessee—Estoppel
See LANDLORD AND TENANT. 2. 304

—— Third-party procedure—Directors' liability
See COMPANY. 3. 197

TIME—Acceptance—Offer by promoters—Purchase-money and compensation - 189
See LANDS CLAUSES ACTS. 2.

—— Contract — For fixed period of time — Implied condition as to - - 287
See CONTRACT. 1.

—— Summons, Time for return of—Sale of food and drugs - - - - 163
See ADULTERATION.

TITLE—Execution—No claim made by owner—Sale—Title of purchaser - - 37
See COUNTY COURT.

TRADE UNION—*Member of Union—Workman—Debt due to Union, Recovery of—Unlawful Means for Lawful Object — Molestation — Interference with Employment — Threatening Employers — Trade Union Officers, Liability of—Combination to injure Workman—Illegal Conspiracy—Threats by single Individual—Damage—Principal and Agent—Liability of Trade Union for Wrongful Acts of Agents.*

Two or more persons, such as the officers of a trade union, who, by virtue of their position, have special power to carry out their design, are not justified in combining to prevent, and in fact preventing, a workman who is or has been a member of the union from obtaining any employment in his trade or calling, to his injury, merely with the object of enforcing payment of a debt due from him to the union. Not only are such

TRADE UNION—*continued.*

persons themselves liable to the workman for the injury so caused by them, but the union is also itself liable for the wrongful acts committed by them as its agents: *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 Ex. 259; *Limpus* v. *London General Omnibus Co.*, (1862) 1 H. & C. 526.

A combination of two or more persons, without justification, to injure any workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable: *Quinn* v. *Leathem*, [1901] A. C. 495. What is a justification must depend upon the circumstances of the particular case.

Per Romer L.J.: Even if a single individual who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that individual is liable to the man for the damage consequently suffered: *Quinn* v. *Leathem*.

Mogul Steamship Co. v. *McGregor, Gow & Co.*, [1892] A. C. 25, *Allen* v. *Flood*, [1898] A. C. 1, and *Quinn* v. *Leathem* considered. GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND - C. A. 600

2. —— "*Stop-day*"—*Cause of Action—Interference with Legal Right—Procuring Breach of Contract—Conspiracy—Malicious Intention—Justification—Mine.*

An intentional interference with the legal right of another person, e.g., the procuring of the breach of a contract with him, is an actionable wrong, unless there be sufficient justification for the interference.

The circumstances which will constitute sufficient justification cannot be satisfactorily defined, and it must be left to the determination of the Court in each case whether there is sufficient justification for an interference.

Per Romer L.J.: In analyzing or considering the circumstances regard may be had to the nature of the contract broken; the position of the parties to it; the grounds for the breach; the means employed to procure it; the relation of the person who procures the breach to the person who breaks the contract; and the object in procuring the breach. In the case of a contract between master and servant it is not sufficient for the person who procures a breach by the servant to shew that he had no personal animus against the master, or that it was to the interest of himself and the servant that the contract should be broken.

Per Vaughan Williams L.J.: In the case of an intentional interference with the contractual rights of other persons there is a legal presumption of malice on the part of the interferer; but he may rebut the presumption by proof of circumstances raising a duty on his part to advise a breach of the contract. The person injured by

TRADE UNION—*continued.*

the breach may, however, neutralize the proof of a duty by shewing express malice on the part of the adviser.

The miners employed at the collieries in South Wales, without giving notice to their employers and in breach of their contracts with them, abstained from working on certain days, called "stop-days." In so doing the miners acted (as the majority of the Court held) under the direction or order of a federation of the miners, given by their executive council. The object of procuring this breach of contract was to keep up the price of coal, upon which the amount of the miners' wages depended.

In an action by the employers against the federation and their officers:—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting), that the defendants were liable in damages, there being no sufficient justification for their interference:

Held, by Vaughan Williams L.J., that the defendants only advised the breach of the contract, and that there was sufficient justification for their action in the duty which they owed to the miners.

Decision of Bigham J., [1903] 1 K. B. 118, reversed. GLAMORGAN COAL COMPANY *v.* SOUTH WALES MINERS' FEDERATION - - **C. A. 545**

TRADER—Insolvent—Fraudulent assignment—Act of bankruptcy - - - **517**
See BANKRUPTCY. 4.

TRANSFER—Forged transfer of stock—Innocent presentment for registration—Implied contract to indemnify - - **580**
See COMPANY. 2.

—— Insolvent trader—Fraudulent assignment—Act of bankruptcy - - - **517**
See BANKRUPTCY. 4.

—— Shares—Insufficient stamp - - **121**
See COMPANY. 4.

TRESPASSERS — Interference by — Effective cause of damage—Liability - **331**
See NEGLIGENCE. 2.

TRIAL—New trial—Interpleader issue—Liverpool Court of Passage - - **140**
See BILL OF SALE. 1.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

UNION—Trade.
See under TRADE UNION.

UNION OF BENEFICES—Compensation—Site of a church—Possibility of future sale
See LANDS CLAUSES ACTS. 1. **728**

UNSEAWORTHINESS—Bill of lading—Unfitness of ship to carry cargo - **378**
See SHIPPING. 2.

VENDOR AND PURCHASER—*Lease, Purchase of—Unusual and Onerous Covenants—Duty of Vendor—Constructive Notice—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-s.* 1.

On a sale of a lease containing unusual and onerous covenants it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must, in order to affect the purchaser without notice of them, shew that he gave him such an opportunity of acquainting himself with the terms of the lease under such circumstances that he ought reasonably to have done so. MOLYNEUX *v.* HAWTREY **C. A. 487**

—— Notice, Purchasers for value without—Insolvent trader—Fraudulent assignment
See BANKRUPTCY. 4. **517**

—— Title—Execution—No claim made by owner—Sale - - - - **37**
See COUNTY COURT.

WAGES — Forfeiture — Seaman — Desertion — Deduction by consent - - **453**
See SHIPPING. 3.

WAGERING — Policy — Insurable interest — Action to recover premiums paid **92**
See CONTRACT. 2.

—— Absence of element of—Whist—Licensing Act - - - - - **428**
See GAMING.

WALL—Party wall—Expense of raising—Building notice—Jurisdiction of arbitrators
See LONDON. 1. **463**

WARRANTY—Implied—Fitness for particular purpose - - - - **148**
See SALE OF GOODS.

—— Seaworthiness — Steamship insufficiently provided with coal - - - **657**
See INSURANCE, MARINE. 2.

WHIST—Absence of element of wagering—Licensing Act - - - **428**
See GAMING.

WIFE.
See under HUSBAND AND WIFE.

WORDS—"held Covered" clause - - **657**
See INSURANCE, MARINE. 2.

—— "Days" - - - - - **363**
See INSURANCE, MARINE. 4.

—— "Debt or obligation" - - - **212**
See PARTNERSHIP.

—— "Distressed seamen" - - - **324**
See SHIPPING. 4.

—— "Extracted" - - - - **701**
See REVENUE. 2.

—— "Good cause" - - - - **533**
See PRACTICE. 2.

—— "Holding" office - - - **633**
See CORPORATION.

—— "Hospital" - - - - **498**
See POOR LAW. 2.

—— "Option" - - - - **639**
See EMPLOYER AND WORKMAN. 3.

—— "Owner, proprietor . . . . original or first vendor" - - - - **6**
See REVENUE. 5.

WORDS—*continued.*
—— "without Prejudice" - - - 639
See EMPLOYER AND WORKMAN. 3.
—— "Proceeding" - - - - 639
See EMPLOYER AND WORKMAN. 3.
—— "Public building" - - - 483
See FACTORY ACTS. 1.
—— "Stop-day" - - - - 545
See TRADE UNION. 2.
—— "Time policy" - - - - 657
See INSURANCE, MARINE. 2.
—— "Unseaworthiness" - - - 378
See SHIPPING. 2.

WORDS—*continued.*
—— "Voyage policy" - - - 657
See INSURANCE, MARINE. 2.
—— "Without prejudice" - - - 639
See EMPLOYER AND WORKMAN. 3.
WORKHOUSE—Factory—Electrical station—"Public building" - - - 483
See FACTORY ACTS. 1.
WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.
WORKSHOP.
See under FACTORY ACTS.

BIBL. LONDIN UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.